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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF MONTANA

FROM DECEMBER 17, 1919, TO MAY 4, 1920.

OFFICIAL REPORT

VOLUME 57

SAN FRANCISCO
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1920

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JUSTICES

OF

THE SUPREME COURT OF THE STATE OF MONTANA,

DURING THE TIME OF THESE REPORTS.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. WILLIAM L. HOLLOWAY,
THE HON. JOHN HURLY,
THE HON. JOHN A. MATTHEWS,
THE HON. CHARLES H. COOPER,
} Associate Justices.

OFFICERS OF THE COURT:

S. CLARENCE FORD, Attorney General.

FRANK WOODY, Asst. Attorney General.

CLARENCE N. DAVIDSON, Asst. Attorney General.

ALBERT A. GRORUD, Asst. Attorney General.

OTTO A. GERTH, Asst. Attorney General.

JAMES T. CARROLL, Clerk.

M. N. RACE, Marshal.

A. C. SCHNEIDER, Court Stenographer.

ATTORNEYS AND COUNSELORS AT LAW.

Admitted from March 29, 1920, to September 30, 1920.

BAIRD, ALVA C., Admitted April 5, 1920.

BALDWIN, CHARLES S., Admitted June 14, 1920.

BOURQUIN, JOHN J., Admitted September 13, 1920.

BROWER, ROBERT C., Admitted September 13, 1920.

BROWN, ARTHUR A., Admitted September 13, 1920.

BUSHER, CHARLES T., Admitted April 5, 1920.

EGNEW, DAVID L., Admitted June 5, 1920.

FOWLER, ROBERT E., Admitted September 14, 1920.

FREDERICKS, HELEN G., Admitted June 14, 1920.

GRACE, F. A., Admitted June 5, 1920.

GRAYBILL, LEO C., Admitted June 5, 1920.

LONG, EUGENE H., Admitted May 3, 1920.

MCHAFFIE, STUART M., Admitted June 14, 1920.

PECHAL, EDWARD, Admitted September 13, 1920.

SINKLER, E. R., Admitted April 19, 1920.

TOOLE, J. HOWARD, Admitted June 5, 1920.

DIRECTORY

OF THE

JUDICIAL DISTRICTS OF THE STATE OF MONTANA

1920

First Judicial District.

County of Lewis and Clark. County Seat, Helena.

District Judges: Hon. R. Lee Word; Hon. W. H. Poorman.

Officers: County Attorney: Jos. R. Wine, Esq.
Clerk of District Court: F. L. Reece.
Sheriff: Geo. W. Huffaker.

Second Judicial District.

County of Silver Bow. County Seat, Butte.

District Judges: Hon. J. J. Lynch; Hon. Edwin M. Lamb; Hon. Joseph R. Jackson.

Officers; County Attorney: N. A. Rotering, Esq.
Clerk of District Court: Otis Lee.
Sheriff: Jno. K. O'Rourke.

Third Judicial District.

Counties of Deer Lodge, Powell and Granite.

District Judge: Hon. George B. Winston.

Officers of Deer Lodge County (County Seat, Anaconda):
County Attorney: David H. Morgan, Esq.
Clerk of District Court: James White.
Sheriff: L. L. Hartsell.

Officers of Powell County (County Seat, Deer Lodge):
County Attorney: W. E. Keeley, Esq.
Clerk of District Court: Robert Midtlyng.
Sheriff: Thos. Mullen.

Officers of Granite County (County Seat, Philipsburg):
County Attorney: D. M. Durfee, Esq.
Clerk of District Court: Wm. B. Calhoun.
Sheriff: Fred. C. Burks.

FOURTH JUDICIAL DISTRICT.

Counties of Mineral, Missoula, Ravalli and Sanders.
District Judges: Hon. A. L. Duncan; Hon. R. Lee McCulloch; Hon. Theodore Lentz.

Officers of Mineral County (County Seat, Superior):
County Attorney: Ivan E. Merrick, Esq.
Clerk of District Court: Blanche M. Hyde.
Sheriff: Wm. La Comb.

Officers of Missoula County (County Seat, Missoula):
County Attorney: Dwight N. Mason, Esq.
Clerk of District Court: Harry M. Rawn.
Sheriff: J. T. Green.

Officers of Ravalli County (County Seat, Hamilton):
County Attorney: Leonard Goodwin, Esq.
Clerk of District Court: J. T. Coughenour.
Sheriff: C. E. Hogue.

Officers of Sanders County (County Seat, Thompson Falls):
County Attorney: Adelbert A. Alvord, Esq.
Clerk of District Court: Wm. Strom.
Sheriff: Joseph L. Hartman.

FIFTH JUDICIAL DISTRICT.

Counties of Beaverhead, Jefferson and Madison.

District Judges: Hon. Joseph C. Smith; Hon. W. A. Clark.

Officers of Beaverhead County (County Seat, Dillon):

County Attorney: Wilber G. Gilbert, Esq.
Clerk of District Court: Fred Rife.
Sheriff: Otto C. Gossman.

Officers of Jefferson County (County Seat, Boulder):

County Attorney: J. E. Kelly, Esq.
Clerk of District Court: W. B. Hundley.
Sheriff: T. L. Locker.

Officers of Madison County (County Seat, Virginia City):

County Attorney: Lyman H. Bennett, Esq.
Clerk of District Court: Matt Carey.
Sheriff: Clarence W. Hungerford.

SIXTH JUDICIAL DISTRICT.

Counties of Park, Stillwater and Sweet Grass.

District Judge: Hon. Albert P. Stark.

Officers of Park County (County Seat, Livingston):

County Attorney: E. M. Niles, Esq.
Clerk of District Court: W. H. Pethybridge.
Sheriff: James McClarty.

Officers of Stillwater County (County Seat, Columbus):

County Attorney: M. L. Parcells, Esq.
Clerk of District Court: G. B. Iverson.
Sheriff: Edward B. Fellows.

Officers of Sweet Grass County (County Seat, Big Timber):

County Attorney: F. M. Lamp, Esq.
Clerk of District Court: H. C. Pound.
Sheriff: G. B. Long.

SEVENTH JUDICIAL DISTRICT.

Counties of Dawson, Richland, Wibaux and McCone.

District Judge: Hon. C. C. Hurley.

Officers of Dawson County (County Seat, Glendive):

County Attorney: Albert Anderson, Esq.
Clerk of District Court: Frank A. Parrett.
Sheriff: A. H. Helland.

Officers of Richland County (County Seat, Sidney):

County Attorney: Chas. E. Collett, Esq.
Clerk of District Court: Guy L. Rood.
Sheriff: Fred. D. Sullivan.

Officers of Wibaux County (County Seat, Wibaux):

County Attorney: Edward F. Fisher, Esq.
Clerk of District Court: A. E. Jeffers.
Sheriff: A. Barclay.

Officers of McCone County (County Seat, Circle):

County Attorney: O. J. Thompson, Esq.
Clerk of District Court: F. S. Kalberg.
Sheriff: H. W. Johnson.

EIGHTH JUDICIAL DISTRICT.

County of Cascade:

District Judges: Hon. Jere B. Leslie; Hon. Harry H. Ewing.

Officers of Cascade County (County Seat, Great Falls):

County Attorney: Howard G. Bennett, Esq.
Clerk of District Court: Geo. Harper.
Sheriff: J. P. Burns.

NINTH JUDICIAL DISTRICT.

County of Gallatin. County Seat, Bozeman.

District Judge: Hon. Ben. B. Law.

Officers: County Attorney: C. E. Carlson, Esq.
Clerk of District Court: W. L. Hays.
Sheriff: Chas. C. Esgar.

TENTH JUDICIAL DISTRICT.

County of Fergus. County Seat, Lewistown.

District Judges: Hon. Roy E. Ayers; Hon. Jack Briscoe.

Officers: County Attorney: Stewart McConochie, Esq.
Clerk of District Court: James L. Martin.
Sheriff: John H. Stephens.

ELEVENTH JUDICIAL DISTRICT.

Counties of Flathead and Lincoln.

District Judge: *B. F. Maiden.

Officers of Flathead County (County Seat, Kalispell):
County Attorney: T. H. MacDonald, Esq.
Clerk of District Court: R. N. Eaton.
Sheriff: W. R. Martin.

Officers of Lincoln County (County Seat, Libby):
County Attorney: W. H. Gray, Esq.
Clerk of District Court: Timothy Miller.
Sheriff: F. R. Baney.

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* Appointed September 1, 1920, to succeed Hon. T. A. Thompson, resigned August 31, 1920.

TWELFTH JUDICIAL DISTRICT.

County of Chouteau.

District Judge: Hon. John W. Tattan.

Officers of Chouteau County (County Seat, Fort Benton):

County Attorney: H. L. Miller, Esq.
Clerk of District Court: Geo. D. Patterson.
Sheriff: Merritt Hanagan.

THIRTEENTH JUDICIAL DISTRICT.

Counties of Carbon, Big Horn and Yellowstone.

District Judges: Hon. Chas. A. Taylor; Hon. A. C. Spencer.

Officers of Carbon County (County Seat, Red Lodge):

County Attorney: H. A. Simmons, Esq.
Clerk of District Court: G. L. Finley.
Sheriff: George Headington.

Officers of Big Horn County (County Seat, Hardin):

County Attorney: Franklin D. Tanner, Esq.
Clerk of District Court: Frank A. Nolan.
Sheriff: John MacLeod.

Officers of Yellowstone County (County Seat, Billings):

County Attorney: E. E. Collins, Esq.
Clerk of District Court: Fred Inabnit.
Sheriff: S. W. Matlock.

FOURTEENTH JUDICIAL DISTRICT.

Counties of Meagher, Broadwater and Wheatland.

District Judge: Hon. Edward H. Goodman.

Officers of Meagher County (County Seat, White Sulphur Springs):

County Attorney: Earle F. Angell, Esq.
Clerk of District Court: Geo. H. Bell.
Sheriff: Geo. B. Nagues.

Officers of Broadwater County (County Seat, Townsend):

County Attorney: Fred. W. Schmitz, Esq.
Clerk of District Court: Fred Bubser.
Sheriff: John J. McDonald.

Officers of Wheatland County (County Seat, Harlowton):

County Attorney: Robt. N. Jones, Esq.
Clerk of District Court: A. T. Anderson.
Sheriff: L. W. Clark.

FIFTEENTH JUDICIAL DISTRICT.

Counties of *Golden Valley, Rosebud, Musselshell and Treasure.

District Judge: Hon. Geo. P. Jones.

Officers of Golden Valley County (County Seat, Ryegate):

County Attorney: C. W. Noyes, Esq.
Clerk of District Court: Reed Hunt.
Sheriff: Jesse Garfield.

Officers of Rosebud County (County Seat, Forsyth):

County Attorney: I. S. Crawford, Esq.
Clerk of District Court: D. J. Muri.
Sheriff: Henry N. Grierson.

Officers of Musselshell County (County Seat, Roundup):

County Attorney: V. D. Dusenbery, Esq.
Clerk of District Court: Reed Hunt.
Sheriff: Chas. C. Hopkins.

Officers of Treasure County (County Seat, Hysham):

County Attorney: E. D. Gerye, Esq.
Clerk of District Court: J. D. Clark.
Sheriff: John Taylen.

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* Golden Valley County created October 6, 1920.

SIXTEENTH JUDICIAL DISTRICT.

Counties of Custer, Fallon, Prairie, Carter, Powder River and Garfield.

District Judges: Hon. Daniel L. O'Hern; Hon. Charles J. Dousman.

Officers of Custer County (County Seat, Miles City):

County Attorney: Frank Hunter, Esq.
Clerk of District Court: C. A. Lindeberg.
Sheriff: Austin B. Middleton.

Officers of Fallon County (County Seat, Baker):

County Attorney: P. C. Cornish, Esq.
Clerk of District Court: Ralph Keener.
Sheriff: F. F. Kelling.

Officers of Prairie County (County Seat, Terry):

County Attorney: Joseph C. Tope, Esq.
Clerk of District Court: W. A. Cameron.
Sheriff: E. H. Brooks.

Officers of Carter County (County Seat, Ekalaka):

County Attorney: Rudolph Nelstead, Esq.
Clerk of District Court: L. J. O'Grady.
Sheriff: Geo. S. Boggs.

Officers of Garfield County (County Seat, Jordan):

County Attorney: John J. Cavan, Esq.
Clerk of District Court: J. P. McDonald.
Sheriff: Matt J. Roke.

Officers of Powder River County (County Seat, Broadus):

County Attorney: N. A. Burkey, Esq.
Clerk of District Court: H. R. Straiton.
Sheriff: W. E. Sutter.

SEVENTEENTH JUDICIAL DISTRICT.

Counties of Phillips and Valley.
District Judge: Hon. H. C. Hall.
Officers of Phillips County (County Seat, Malta):
County Attorney: F. C. Gabriel, Esq.
Clerk of District Court: C. M. Porter.
Sheriff: Thos. S. Johnson.

Officers of Valley County (County Seat, Glasgow):
County Attorney: Carl D. Borton, Esq.
Clerk of District Court: Oscar S. Cutting.
Sheriff: C. W. Powell.

EIGHTEENTH JUDICIAL DISTRICT.

Counties of Blaine, Hill and Liberty.
District Judge: Hon. Frank E. Carleton.
Officers of Blaine County (County Seat, Chinook):
County Attorney: D. L. Blackstone, Esq.
Clerk of District Court: A. W. Zicbarth.
Sheriff: J. Q. Laswell.

Officers of Hill County (County Seat, Havre):
County Attorney: C. R. Stranahan, Esq.
Clerk of District Court: Geo. W. Glass.
Sheriff: Matthew McLain.

Officers of Liberty County (County Seat, Chester):
County Attorney: B. R. McCabe, Esq.
Clerk of District Court: George H. Gau.
Sheriff: John Morgan.

NINETEENTH JUDICIAL DISTRICT.

Counties of Glacier, Pondera, Teton and Toole.
District Judge: Hon. John J. Greene.
Officers of Glacier County (County Seat, Cut Bank):
County Attorney: Wiley Shannon, Esq.
Clerk of District Court: Iden Rasmussen.
Sheriff: P. A. Davis.

Officers of Pondera County (County Seat, Conrad):
County Attorney: Wm. L. Bullock.
Clerk of District Court: C. H. Shepherd.
Sheriff: J. L. Billings.

Officers of Teton County (County Seat, Chouteau):
County Attorney: George W. Magee, Esq.
Clerk of District Court: Paul Jacobson.
Sheriff: I. S. Martine.

Officers of Toole County (County Seat, Shelby):
County Attorney: Jesse G. Henderson, Esq.
Clerk of District Court: Perry J. Day.
Sheriff: J. S. Alsup.

TWENTIETH JUDICIAL DISTRICT.

Counties of *Daniels, Roosevelt and Sheridan.

District Judge: Hon. C. E. Comer.

Officers of Daniels County (County Seat, Scobey):
County Attorney: John S. Nyquist, Esq.
Clerk of District Court: John Shippam.
Sheriff: David J. Martin.

Officers of Roosevelt County (County Seat, Mondak):
County Attorney: Ernest L. Walton, Esq.
Clerk of District Court: T. Forbes.
Sheriff: P. J. Nacey.

Officers of Sheridan County (County Seat, Plentywood):
County Attorney: J. J. Gunther, Esq.
Clerk of District Court: O. R. Girard.
Sheriff: Jack Bennett.

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* Daniels County created September 1, 1920.

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SUPREME COURT RULES.

For the Rules of the Supreme Court of the State of Montana, see 53 Mont. xxvii.

Amendment, see 54 Mont. xxxi.

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

DECEMBER TERM, 1919.

ERRATA.

On page xvi, line 3 from bottom of page, the name "O. R. Girard" should read "Albert R. Chapman."

On page 7, line 5 from bottom of page,-the word "accomplishments," should read "accomplishment."

On page 77, at close of opinion, in case of *Jonosky* v. *Northern Pacific Ry. Co.*, read "Mr. Chief Justice Brantly and Associate Justices Hurly, Matthews and Cooper concur," leaving out "Holloway."

Real Property—Contract of Sale—Broker's Commission.

1. Where a real estate broker entered into a contract with a land owner under the terms of which he was made agent "to sell" the latter's property for a commission, he was not entitled thereto upon the mere production of a buyer who was financially irresponsible, but could insist on payment only when the buyer furnished was ready, willing and able to complete the purchase according to the terms agreed upon.

Same—Contract to Sell and Buy—Nature of Transaction.

2. An agreement to sell and buy is preliminary to a sale, resulting in a sale only if the terms thereof are fulfilled.

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

DECEMBER TERM, 1919.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. WILLIAM L. HOLLOWAY,
THE HON. JOHN HURLY,
THE HON. JOHN A. MATTHEWS,
THE HON. CHARLES H. COOPER,
} Associate Justices.

WRIGHT LAND & INVESTMENT CO., RESPONDENT, v. EVEN ET AL., APPELLANTS.

(No. 4,060.)

(Submitted November 13, 1919. Decided December 17, 1919.)

[186 Pac. 681.]

Real Property—Sales—Brokers—Commissions—Purchase Price—Default in Payment—Effect—Contracts—Interpretation.

Real Property—Contract of Sale—Brokers—Commissions.

1. Where a real estate broker entered into a contract with a land owner under the terms of which he was made agent "to sell" the latter's property for a commission, he was not entitled thereto upon the mere production of a buyer who was financially irresponsible, but could insist on payment only when the buyer furnished was ready, willing and able to complete the purchase according to the terms agreed upon.

Same—Contract to Sell and Buy—Nature of Transaction.

2. An agreement to sell and buy is preliminary to a sale, resulting in a sale only if the terms thereof are fulfilled.

Same — Deeds — Escrow — Immediate Possession — Nature of Title of Buyer.

3. Where the buyer of land was permitted to take immediate possession under a contract which provided for payment of the purchase price in annual installments, deed to be deposited in escrow and delivered upon full compliance with the terms of sale, his title was no more than an equitable one, default on his part in any one of its conditions giving the seller the privilege to declare his rights lost and consider him a mere tenant at will.

Contracts—Ambiguity—Interpretation Against Whom.

4. Under section 5043, Revised Codes, ambiguity in the language of a contract must be interpreted most strongly against the party who drew it.

Real Property—Contract of Sale—Breach—Liquidated Damages—Rent.

5. Where a contract of sale of land contains a provision that a fixed amount may be regarded as liquidated damages or as rent in case of default in any deferred payment of the purchase price, the instrument is executory in character, and not a sale.

Appeals from District Court of Fergus County; Roy E. Ayers, Judge.

ACTION by the Wright Land & Investment Company against Peter Even and others. Judgment for plaintiff, and defendants appeal from it and an order overruling their motion for a new trial. Reversed, with directions to enter judgment for defendants.

Messrs. Blackford & Huntoon and *Mr. Oscar O. Mueller,* for Appellants, submitted a brief; *Mr. Mueller* argued the cause orally.

The law upon the question presented is as stated in *Munroe* v. *Taylor,* 191 Mass. 483, 78 N. E. 106. This was a case in which the plaintiff, upon making a sale, was to receive as his compensation all he could obtain beyond a certain sum; a contract to purchase was entered into in writing and the court says: "What the plaintiff really undertook was not only to find a purchaser at a fixed price, but to effect a sale, which meant a payment of that price, and this having been done, he would have earned the excess, but until the consideration became payable, or the defendant refused to convey, he could not demand any remuneration or maintain an action for breach of the contract." (See, also, *Walker* v. *Tirrell,* 101 Mass. 257, 3 Am.

Rep. 352; *Burnett* v. *Potts*, 236 Ill. 499, 86 N. E. 258; *Sill* v. *Ceschi*, 167 Cal. 698, 140 Pac. 949; *Wolverton* v. *Tuttle*, 51 Or. 501, 94 Pac. 961.)

Mr. O. W. Belden and *Mr. Frank A. Wright*, for Respondent, submitted a brief; *Mr. H. L. De Kalb*, of Counsel, argued the cause orally.

In *Christensen* v. *Cram*, 156 Cal. 633, 105 Pac. 950, the court said: "It is alleged that the plaintiff sold the property to defendant at the price named. The word 'sold' is often used to indicate an executory agreement for the sale of property. Instances of such use are exhibited in *Blackwood* v. *Cutting Packing Co.*, 76 Cal. 212, 9 Am. St. Rep. 199, 18 Pac. 248; *Eaton* v. *Richeri*, 83 Cal. 185, 23 Pac. 286; *Pettinger* v. *Fast*, 87 Cal. 461, 25 Pac. 680; *Shainwald etc. Co.* v. *Cady*, 92 Cal. 83, 28 Pac. 101, cited by the appellant. For example, if by contract an agent is to receive a commission upon a sale of property, or when property is sold, a valid executory agreement of sale will answer the condition. The word 'sale' does not necessarily, and in all connections, mean that a conveyance must be made, or that the title must pass. (*Eaton* v. *Richeri, supra.*)"

In this connection the provisions of our Code become of the utmost importance, for all the cases recognize that when a contract, whether of sale or for sale, of real estate is entered into, an interest, to-wit, the equitable title, passes to the purchaser. Section 5079 of the Revised Codes reads as follows: "Sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property." Again section 5033 provides: "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." The court knows the popular meaning of the word "sale." Any man who has entered into a contract to sell habitually declares that he has sold his property. In this case we have shown that

the word has a legal meaning in this connection consistent with that custom. We refer the court to the following further cases on this point: *Betz* v. *Williams etc. Loan Co.*, 46 Kan. 45, 26 Pac. 456; *Lawler* v. *Armstrong*, 53 Wash. 664, 102 Pac. 775; *Hugill* v. *Weekley*, 64 W. Va. 210, 15 L. R. A. (n. s.) 1262, 61 S. E. 360.

It was held in a case where the brokerage contract made an actual sale a condition precedent to the right of the broker to demand compensation that where a valid contract was entered into between the principal and a customer, the broker, having acted in good faith, was not deprived of his commission by the fact that the customer failed to carry out the contract. (*Davis* v. *Lawrence*, 52 Kan. 383, 34 Pac. 1051; *Willes* v. *Smith*, 77 Wis. 81, 45 N. W. 666; *Mitchell* v. *Aten*, 37 Kan. 33, 1 Am. St. Rep. 231, 14 Pac. 497; *Neiderlander* v. *Starr*, 50 Kan. 770, 33 Pac. 592; *Little* v. *Fleishman*, 35 Utah, 566, 24 L. R. A. (n. s.) 1182, 101 Pac. 984; *Humphries etc.* v. *Smith*, 5 Ga. App. 340, 63 S. E. 248; *Francis* v. *Baker*, 45 Minn. 83, 47 N. W. 452; *Burns* v. *Oliphant*, 78 Iowa, 456, 43 N. W. 289; *Kalley* v. *Baker*, 132 N. Y. 1, 28 Am. St. Rep. 542, 29 N. E. 1091; *Badger Silver Min. Co.* v. *Drake*, 88 Fed. 48, 31 C. C. A. 378; *Keinath, Schuster & Hudson* v. *Reed*, 18 N. M. 358, 137 Pac. 841.)

Counsel insists that where the commission contract provides for the broker receiving all over a certain sum, the broker must collect from the purchaser of the land, and cite the case of *Wolverton* v. *Tuttle*, 51 Or. 501, 94 Pac. 961, as authority. What is said there is *obiter dictum* in the first place, and is not supported by other authorities in the second place. In that particular case it was held that the broker was not entitled to any commission because all he procured was the net price. This is not in any sense an authority, for the reason mentioned. (*Reams* v. *Wilson*, 147 N. C. 304, 60 S. E. 1124.) The holding which the appellants seem to think is made in the *Wolverton-Tuttle Case* would be at variance with all the decided cases on the question of the person to whom the broker must look for compensation. Thus, in *Arnold* v. *National Bank of Waupaca*,

126 Wis. 362, 3 L. R. A. (n. s.) 580, 105 N. W. 828, the court says of a contract providing for the payment of commissions of all over and above a certain net price in a suit by the broker against the principal, that: "The authorities are uniform to the proposition that such act on the part of a real estate agent employed to find a customer at a net price to the seller, earns the agreed commission whether sale is consummated or not, and although failure to make sale is due to the owner's inability to make good title. (*Riemer* v. *Rice*, 88 Wis. 16, 59 N. W. 450; *Donohue* v. *Padden*, 93 Wis. 20, 66 N. W. 804; *Phelps* v. *Prusch*, 83 Cal. 626, 23 Pac. 1111; *Fitzpatrick* v. *Gilson*, 176 Mass. 477, 57 N. E. 1000; *Monk* v. *Parker*, 180 Mass. 246, 63 N. E. 793.) Contracts of this character are treated by the courts as entitling the broker to sue the principal for the amount of the commission regardless of whether it is paid or not. (*Mattingly* v. *Roach*, 84 Cal. 213, 23 Pac. 1117; *Church* v. *Dunham*, 14 Idaho, 776, 96 Pac. 203.) In this respect we might mention that there is a distinction to be made between the use of the term "net" and "net cash." (5 Words and Phrases, Old Series, 4776; *Love* v. *Scatcherd*, 146 Fed. 1, 77 C. C. A. 1.)

MR. JUSTICE COOPER delivered the opinion of the court.

This is an action to recover a commission for the sale of lands. The following contract (Exhibit "A"), partly written and partly printed, was prepared by the manager of the land department of the plaintiff and by the defendant J. C. Miller, acting as trustee for his codefendants, signed and delivered to plaintiff:

[1] "No. ——— May 9, 1914.

"I hereby appoint Wright Land & Investment Company of Lewistown, Montana, ———, agent to sell the following real estate in Fergus county, Montana, to-wit: N. ½, Sect. 14, South ½ and NW. ¼, Sect. 11, Twp. 16, Range 15, including crop now on place except ½ of crop on N. 160.

"I will accept for said property the sum of $45.00 per A. net, on the following terms, to-wit: $1,000 at the time of enter-

ing into the contract of sale, balance terms to be arranged, * * * .

"I agree to furnish purchaser with warranty deed and abstract of title showing perfect title. At time of sale I agree to pay said agent as commission for selling said property $—— any amount he can get over the above price.

"I reserve the right myself to sell or to list with other agents. Unless sale is made by myself or by other agents, this appointment will hold good until notified.

"Signed—J. C. MILLER, Trustee."

Acting thereunder, plaintiff produced as a purchaser one Frank Bralley, between whom and defendant Miller, trustee, a paper entitled "Contract for the Sale of Real Estate," hereafter called Exhibit "B," was entered into, in which defendants agreed to sell, and Bralley agreed to buy, the lands of defendants. Under its terms there was to be deposited in escrow in the Bank of Fergus county, a good and sufficient deed to the premises, with instructions for its delivery to the purchaser upon compliance with the terms prescribed therein. The payments were divided into nine; the first, of one dollar, to be paid on delivery to the bank of Exhibit "B"; the second, of $2,000, on January 1, 1915; and the other seven, varying in amounts, on the first day of January of each succeeding year thereafter, until January 1, 1922. It was provided that Bralley should take possession of the premises, cultivate and raise crops thereon, and after deducting the cost of production and marketing thereof, the overplus should be applied to the payment of the principal and interest to become due upon the next succeeding installment; that all state and county taxes, after 1914, should be paid by Bralley; and, by direction of defendants' Exhibit 1, the memorandum accompanying the escrow, in the event of a full compliance on the part of Bralley with Exhibit "B," the deed to the land should be delivered by the bank to him.

The complaint alleges the performance of all of the covenants, terms and conditions to be performed by the plaintiff and that

the commission of $2,400, for the making of the sale, is due. The answer denies the making of a sale of the premises and that a commission is now due plaintiff, or will be due until the payment of the full purchase price therefor. A trial was had before the court without a jury, and judgment rendered in favor of the plaintiff for the sum of $2,400. Defendants' motion for a new trial was overruled. They appeal from the judgment and from the order overruling the motion.

The court erred, it is insisted by appellants, in finding that the commission of $2,400 was due plaintiff immediately upon the execution and deposit in escrow of Exhibit "B." Respondent's position is that the "time of sale" was signaled by its signing and delivery in escrow. Appellants insist that a sale was not, and could not be, consummated until the requirements of Exhibit "B" were met by the proposed purchaser. Does that instrument embody terms and conditions the legal equivalent of a sale absolute, or merely a contract executory in its nature? A careful analysis of our Code provisions defining sales and providing rules for the interpretation of contracts such as these will render a correct solution of the question comparatively easy; for if, by the use of the words in Exhibit "A," "at the time of sale I agree to pay said agent as commission for selling said property," was meant that plaintiff's commission was earned when a contract of purchase was executed, then the judgment must stand; if it was not earned until the purchase price had been fully paid, the action was prematurely brought, and judgment must be ordered in appellants' favor.

What were the ultimate aims and objects of the parties? Obviously, upon the part of plaintiff, it was the earning of the three dollar per acre commission; upon the part of defendants, it was the sale of their lands for the sum of forty-five dollars per acre net to them. Upon the accomplishments of these purposes the minds of both parties met. The record discloses the following to be undisputed: The words "May 9, 1914," the word "Fergus" before "County," and the description of the land, and the words "including crop now on the place except

½ of crop on N. 160," and the price "$45.00 per A net," "the price '$1,000,'" payment to be made at the time of entering into the contract, and the words "balance terms to be arranged," the word "notified" in the last line, and the signature "J. C. Miller, Trustee," are all in pen and ink handwriting. The above quotations are taken from the testimony of Lloyd D. Burton, the manager of the land department of the plaintiff. It was agreed upon the trial that the terms and stipulations of Exhibit "B" "have been on the part of both parties thereto fully complied with"; that nobody was then in default, "and that the money has not been paid, and that the commission sued for has not been paid." Bralley viewed the land; it was priced to him by plaintiff at forty-eight dollars per acre; he took immediate possession under Exhibit "B," harvested and marketed the crops already planted and growing thereon, and from the proceeds paid the sum of $487.17 on the principal due January 1, 1915, leaving a deficit on the next installment due January 1, 1916, of $1,512.83. Bralley had no money; was in financial straits and unable to meet the payments as they fell due. The record further shows that $487.17 was the only payment made upon the principal at all; and that the defendants are able, willing and ready to pay plaintiff's commission when the same is earned and the purchase price fully paid.

Exhibit "B" also contained the following: "In the event of a failure to comply with the terms hereof by the said party of the second part [Bralley], or either of them [the terms], the first party [defendants] shall be released from all obligations to convey the said premises or any part thereof; and the said party of the second part [Bralley] shall forfeit all payments made thereon which shall be considered as rental for the said premises, as it would be difficult to fix the actual damage to the party of the first part [defendants] by the said party of the second part [Bralley]."

There is oral testimony in the record, conflicting in character, concerning the time the commission would be due; but as the intention of the parties is evident enough from the writings

themselves, and the evidence would tend to vary them, no consideration need be given it.

A careful scrutiny of Exhibit "A" reveals that by the first paragraph, plaintiff is made the agent of the trustee to *sell* the property described; by the second, the minimum figure (forty-five dollars per acre) the trustee is to receive therefor, and the terms the agent (plaintiff) is to make to the buyer "at time of entering into contract of sale" are fixed (the quoted words in print); "balance terms to be arranged" in pen and ink. By the third paragraph, the trustee agrees to furnish abstract showing perfect title, and "at time of sale" agrees to pay the agent for *selling* said property, "any amount *he can get* over the above price." By the last, the trustee reserves the right to himself to *sell*, or to list with other agents; and "unless *sale* is made by myself, or other agents, this appointment will hold good until notified." With what degree of reason can it be contended that the whole tenor of the contract contemplated anything less than a completed sale? True, the printed words are, "at time of entering into contract of sale." But they were there already—not inserted at the dictation of the trustee, so far as the record shows. They must, therefore, be subordinated to the written words. Section 5039 of the Revised Code reads: "Particular clauses of a contract are subordinate to its general intent." The following section also has particular reference to, and is aimed directly at, a contract prepared as this was, as will appear by its language: "When a contract is partly written and partly printed, or where part of it is written or printed under the special directions of the parties, and with a special view of their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts and the parts which are purely original control those which are copied from a form. And if the two are absolutely repugnant, the latter must be so far disregarded." Section 5041 reads: "Repugnancy in a contract must be reconciled, if possible, by such an interpretation

as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract." The general intent here is plain upon the face of Exhibit "A." "I hereby appoint Wright Land & Investment Company of Lewistown, Montana, *agent to sell,*" are its opening words; and, further on, in the fourth paragraph: "I reserve the right to myself to *sell,*"—not "I reserve to myself the right to make an agreement to sell," nor "to make a contract for a sale." Exhibit "A" is an agreement establishing an agency to sell; Exhibit "B" an agreement for a sale. The latter is conspicuously labeled, "Contract for the Sale of Real Estate"; and in express words, "the said party of the first part (Miller, Trustee) agrees to sell and convey," and the second party (Bralley) "agrees to buy" the premises in question. The transaction plaintiff perfected when it procured Bralley to enter into Exhibit "B," was, therefore, not a sale.

Section 5084, Revised Codes, reads as follows: "An agree-
[2] ment to sell and buy is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the same from him and to pay a price therefor." The early case of *Ide* v. *Leiser*, 10 Mont. 5, 24 Pac. 695, decided by this court before the Codes, defines an agreement to sell, as "a contract to be performed in the future, and if fulfilled, results in a sale. It is preliminary to a sale, and is not the sale. Breaches, rescission or release may occur, by which the contemplated sale never takes place." Thus it is made clearly to appear that Exhibit "B" did not effect a transfer of title—was not a sale, but only an executory agreement to buy.

What, then, was the title under which Bralley held? Clearly,
[3] not more than an equitable one; for his right of possession endured only so long as the requirements of the contract were promptly met; upon default in any one of its conditions, he might be subjected to the loss of all his rights and reduced to merely a tenant at the will of the seller. (*Knapp* v. *Andrus*, 56 Mont. 37, 180 Pac. 908.) Under the interpretation given the agreements by the court below, defendants are held liable

to pay a commission on an uncompleted sale that may never be consummated. By section 5031, Revised Codes, all three of the contracts "are to be taken together." And by force of section [4] 5043, in cases of uncertainty "the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." In this case, such party is the respondent; for it was the author of all the contracts forming the basis of this controversy, and must be held to have employed words to best express the purpose it sought to accomplish. The effect of the trial court's ruling, in view of the inability of the buyer to make even the first payment, would be to force from the pockets of appellants a commission of $2,400 not yet earned, and before the receipt by them of any substantial sum to compensate them for the use of their property in the interim.

The conclusion we have reached is in full accord with the adjudicated cases upon the subject, as will presently be seen. Many of the commissions due to agents and brokers turn more or less upon implied obligations growing out of the peculiar circumstances in the decided cases. Here the contract expressly states the terms and conditions of the obligation and the minimum price the seller is to receive, leaving no room for implication. The plaintiff, in words of its own choosing, was empowered to make a sale at a fixed price per acre of forty-five dollars to the defendants, its compensation to be "any amount he can get over the above price." The complaint alleges a sale. Under the listing agreement, the plaintiff undertook to produce a purchaser ready, willing and able to buy, and this necessarily implied a consummated sale—such a contract as the courts will enforce on demand. This it failed to do. Recovery can only be had upon proof of a sale in fact.

In Clark & Skyles on the Law of Agency, volume 2, section 771, the general rule is stated thus: "It is not sufficient that he should enter into an agreement to purchase, but he must actually purchase, by complying with the terms agreed upon, unless his failure to do so is occasioned by the fault of the ven-

dor." The text is amply supported by the following authorities: *Cremer* v. *Miller,* 56 Minn. 52, 57 N. W. 318; *Lawrence* v. *Rhodes,* 188 Ill. 96, 58 N. E. 910; *Cavanaugh* v. *Conway,* 36 R. I. 571, 90 Atl. 1080; *Haynes* v. *Oliver,* 154 Ill. App. 639; *Rankin* v. *Grist,* 61 Tex. Civ. App. 484, 129 S. W. 1147; *Crum* v. *Slade etc.* (Tex. Civ.), 154 S. W. 351; *Moss & Raley* v. *Wren,* 102 Tex. 567, 113 S. W. 739, 120 S. W. 847; *Felts* v. *Butcher,* 93 Iowa, 414, 61 N. W. 991; *Warnekros* v. *Bowman,* 14 Ariz. 348, 43 L. R. A. (n. s.) 91, 128 Pac. 49; *Bader* v. *Moore Bldg. Co.,* 94 Wash. 221, 162 Pac. 8; *Holcomb* v. *Stafford,* 102 Minn. 233, 113 N. W. 449; *Scott* v. *Merrill's Estate,* 74 Or. 568, 146 Pac. 99; *Lawrence* v. *Pederson,* 34 Wash. 1, 74 Pac. 1011; *Zurcher* v. *Booth,* 80 Or. 335, 157 Pac. 147; *Block* v. *Ryan,* 4 App. Cas. (D. C.) 283; *Bradford* v. *Menard,* 35 Minn. 197, 28 N. W. 248; *Olsen* v. *Jodon,* 38 Minn. 466, 468, 38 N. W. 485; *Munroe* v. *Taylor,* 191 Mass. 483, 78 N. E. 106, 108; Walker on the Law of Real Estate Agency, secs. 85, 119; 24 Am. & Eng. Ency. of Law, 1045; 19 Cyc. 252.

Authorities abound in an unbroken line, holding that where **[5]** a writing contains a provision that a fixed amount may be regarded as liquidated damages, and as rent, it makes of such an instrument an obligation, executory in character, and not a sale. (*Lawrence* v. *Rhodes, supra; Kimberly* v. *Henderson,* 29 Md. 512; *Moss etc.* v. *Wren, supra; Lewis* v. *Briggs,* 81 Ark. 96, 98 S. W. 683; *Lawrence* v. *Pederson, supra; Block* v. *Ryan, supra; Ramsey* v. *West Texas Bank & T. Co.* (Tex. Civ.), 155 S. W. 551; *Simpson* v. *Eardley* (Tex. Civ.), 137 S. W. 378; *Cavanaugh* v. *Conway, supra; Douglas* v. *Spangenberg,* 23 Cal. App. 294, 137 Pac. 1103; *Condict* v. *Cowdrey,* 139 N. Y. 273, 34 N. E. 781; 19 Cyc. 251; Walker on the Law of Real Estate Agency, sec. 85.)

"In *Keener* v. *Harrod,* 2 Md. 63, 70, 56 Am. Dec. 706, the court said: 'The legal import of an agreement to procure a purchaser, binds the party to name a person who ultimately *buys* the property,' as was held in *Murry* v. *Currie,* 32 Eng. Com. L. 641, cited by the court in support of its language. In

Kimberly v. *Henderson*, 29 Md. 512, 515, the court said: 'To be entitled to their commissions as brokers they should have completed the sale, that is, they should have found a purchaser in a situation, and ready and willing to complete the purchase according to the terms agreed upon. The undertaking to procure a purchaser requires of the party so undertaking, to produce a party capable and who ultimately becomes the purchaser. These propositions are settled in *Keener* v. *Harrod*, 2 Md. 63, and *McCavock* v. *Woodlief*, 20 How. (U. S.) 221, 15 L. Ed. 884.' In *Kimberly* v. *Henderson*, *supra*, there was a written agreement for sale with a stipulation that in case either party should fail to comply with the contract, a forfeit of $1,000 should be paid by the party in default to the other party. The vendee was unable to comply, being disappointed in the receipt of funds which he expected to receive, and he paid the forfeit accordingly." (*Riggs* v. *Turnbull*, 105 Md. 135, 11 Ann. Cas. 783, 8 L. R. A. (n. s.) 824, 66 Atl. 13.)

The effect of the ruling of the trial court, interpreting the meaning of the contracts to be that the plaintiff's commission was earned immediately upon the execution of Exhibit "B" and its deposit in escrow with the deed, was to import into the agreement a meaning not to be inferred from the language used. Upon no possible theory can the conclusion be sustained.

The judgment and order overruling defendants' motion for a new trial are reversed, with directions to enter judgment for defendants.

Remanded with directions.

ASSOCIATE JUSTICES HOLLOWAY, HURLY and MATTHEWS concur.

MR. CHIEF JUSTICE BRANTLY concurs in the result.

Motion for rehearing denied January 23, 1920.

SMITH, RESPONDENT, v. NORTHERN PACIFIC RY. CO., APPELLANT.

(No. 4,067.)

(Submitted December 12, 1919. Decided December 29, 1919.)

[186 Pac. 684.]

Railroads—Right of Way—Eminent Domain—Damages—Indians—Citizenship—Real Property—Vendor and Purchaser—Damages—Who may Claim.

Indians—Allotments of Land in Severalty—Citizenship—Rights Acquired.

1. *Held*, that an Indian who had severed his tribal relations and acquired an allotment of land under the Act of Congress of June 5, 1872 (17 Stats. at Large, p. 226), became a citizen of the United States upon approval of the Act of February 8, 1887 (24 Stats. at Large, p. 390), and entitled to institute or defend actions of ejectment or trespass in state or federal courts, regardless of the prohibition against the alienation of the land obtained under the allotment.

Railroads—Eminent Domain—Vendor and Purchaser—Who Entitled to Damages.

2. Where land is taken by a railroad company under its power of eminent domain, the right to compensation for damages accrues to the owner at once, and does not pass to a subsequent purchaser by the mere conveyance of the land.

[As to the right of a purchaser of land on which a railroad right of way has been constructed to recover compensation therefor, see note in Ann. Cas. 1912A, 1056.]

Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.

ACTION by Rolla B. Smith against the Northern Pacific Railway Company. Plaintiff had judgment. Defendant appeals. Reversed, with directions to dismiss the action.

Messrs. Gunn, Rasch & Hall, for Appellant, submitted a brief; *Mr. E. M. Hall* argued the cause orally.

Where an entryman relinquishes his entry before perfecting patent but after a railroad company had complied with the statute of March 3, 1875, and on the date of such relinquishment or thereafter another person made homestead entry on the same

land, the railroad's right of way over the land is superior to the rights of the new homestead entryman, there being no privity of estate between the original entryman and the second entryman, the latter's right dating only from the time of his application to enter the land. (*Hamilton* v. *Spokane R. Co.*, 3 Idaho, 164, 28 Pac. 408; *Jamestown etc. R. Co.* v. *Jones*, 7 N. D. 619, 76 N. W. 227; *Alexander* v. *Kansas City etc. R. Co.*, 138 Mo. 464, 40 S. W. 104; *Bonner* v. *Rio Grande Southern R. R. Co.*, 31 Colo. 446, 72 Pac. 1065; *Pierce* v. *Chicago, M. & S. P. Ry.*, 52 Mont. 110, 156 Pac. 127.) So in the case at bar, the plaintiff's right to the land takes effect only from the date of his application to purchase on December 4, 1909, and is subject to the right of way across said land acquired by the railroad and used continuously since 1887.

Plaintiff has no right of action. The first defense sets out a complete and sufficient defense as against a demurrer thereto, for the reason that if the allegations therein contained are true, they show a vested title in the defendant and his predecessors in interest to the right of way 200 feet wide across this land, and an open and continuous use and operation thereof since 1887, while the complaint shows that plaintiff did not make application to purchase until 1909. Under such circumstances he cannot maintain an action for damages to such land by reason of such right of way. The right of action, if any, for such damages, belongs exclusively to the owner of the land at the time the company took possession thereof for a right of way. (*Roberts* v. *Northern Pac. R. R. Co.*, 158 U. S. 1, 39 L. Ed. 873, 15 Sup. Ct. Rep. 756; *Northern Pacific R. Co.* v. *Murray*, 87 Fed. 648, 31 C. C. A. 183; *Green* v. *South Bound R. Co.*, 112 Ga. 849, 38 S. E. 81; *Kakeldy* v. *Columbia & P. S. R. Co.*, 37 Wash. 675, 80 Pac. 205; *Maffet* v. *Quine*, 93 Fed. 347.)

Defendant pleads the defenses of title by adverse possession under claim of title based on color of title and various statutes of limitation as a bar to plaintiff's action. There is no question but what the grant of rights of way by the Act of Congress of March 3, 1875, when complied with by a railroad, and its

map of definite location filed and approved by the secretary of interior and the right of way actually possessed and used, gives the railroad an occupancy and possession under a claim of title based on color of title. "Color of title" and "claim of title" are defined and the above statutes construed by our supreme court in the recent case of *Morrison* v. *Linn*, 50 Mont. 396, 147 Pac. 166, 167. (See, also, 1 Cyc. 1082–1084; 2 C. J., secs. 323–325; 15 L. R. A. (n. s.) 1215, and exhaustive note; 1 R. C. L. 706, 707.)

A patent to land, previously patented to another, although void and passing no title, constitutes color of title. (*Payne* v. *Markle*, 89 Ill. 66; *Middlesboro W. W. Co.* v. *Neal*, 105 Ky. 586, 49 S. W. 428; *East Tennessee Iron etc. Co.* v. *Wiggin*, 68 Fed. 446, 15 C. C. A. 510; *Weaver* v. *Love*, 146 N. C. 414, 59 S. E. 1041; *Williamson* v. *Brown*, 49 Tex. Civ. App. 402, 109 S. W. 412; *Bryant* v. *Strunk*, 151 Ky. 97, 151 S. W. 381; *Southern Ry. Co.* v. *Cleveland*, 169 Ala. 22, 53 South. 767.) "Good faith" is not essential to color of title. (1 Cyc. 1101; 1 R. C. L. 709; 15 L. R. A. (n. s.), and cases cited on p. 1248 of note.)

Where one occupies land under "color of title" for the required period to obtain title by prescription, he acquires title not only to the land actually occupied and used, but also to the entire tract as described in his muniment. (Sec. 6436, Rev. Codes; *Morrison* v. *Lynn, supra; Ainsa* v. *New Mexico & A. R. Co.*, 13 Ariz. 320, 114 Pac. 971; *Northern Pacific R. Co.* v. *Smith*, 171 U. S. 260, 43 L. Ed. 157, 18 Sup. Ct. Rep. 794; *Hargis* v. *Kansas City etc. Ry. Co.*, 100 Mo. 210, 13 S. W. 680; *Seaboard Air Line R.* v. *Olive*, 142 N. C. 257, 55 S. E. 263.)

By virtue of said Act of 1887, Indians who have severed their tribal relations and taken allotments are citizens, and entitled to institute or defend actions in state or federal courts; and that they can maintain actions in ejectment or for trespass on the land selected by them. (*Wa-La-Note-Tke-Tynin* v. *Carter*, 6 Idaho, 85, 53 Pac. 106; *Carter* v. *Wann*, 6 Idaho, 556, 57 Pac. 314; *Brown* v. *Anderson* (Okl.), 160 Pac. 724; *Bird* v. *Terry*, 129 Fed. 472; *Sorrels* v. *Jones*, 26 Okl. 569, 110 Pac. 743; *Smith*

v. *Mosgrove*, 51 Or. 495, 94 Pac. 970; *State* v. *Norris*, 37 Neb. 299, 55 N. W. 1086; *State* v. *Denoyer*, 6 N. D. 586, 72 N. W. 1014.)

Plaintiff was estopped to maintain the action. (*Roberts* v. *Northern Pacific R. Co.*, 158 U. S. 1, 39 L. Ed. 873, 15 Sup. Ct. Rep. 756; *Northern Pacific R. Co.* v. *Smith*, 171 U. S. 260, 43 L. Ed. 157, 18 Sup. Ct. Rep. 794; *Kakeldy* v. *Columbia & P. S. R. Co.*, 37 Wash. 675, 80 Pac. 205; *Little Bill* v. *Swanson*, 64 Wash. 650, 117 Pac. 481; *Donohoe* v. *El Paso & S. W. R. Co.*, 11 Ariz. 293, 94 Pac. 1091; *Penrhyn Slate Co.* v. *Granville Electric L. & P. Co.*, 181 N. Y. 80, 2 Ann. Cas. 782, 73 N. E. 566.)

Mr. George T. Baggs, for Respondent, submitted a brief.

The pleadings of the defendant and its brief in support of its contention are based, it seems, upon a false premise, namely, that the land in question was part of the public domain of the United States. This presumption, we contend, is erroneous, and, being incorrect, appellant's argument and cases cited in support thereof have no application to the case at bar.

From the time the lands in the Bitter Root Valley were withdrawn from settlement by President Grant by proclamation prior to the Act of June 5, 1872, for the purpose of determining whether the Bitter Root Valley would make a better reservation for the Flathead Indians than the Jocko, said lands were held to be in a state of reservation and not part of the public domain of the United States. This question was definitely settled long ago when it was held by the Land Department that the land grant of the Northern Pacific Railroad Company did not extend to the Bitter Root Valley as defined by the secretary of the interior, being the fifteen townships originally surveyed under the Act of June 5, 1872, because said lands were in a state of reservation, and this contention has been uniformly upheld by the courts of the country.

It is a well-settled rule that when a treaty or statute prescribes a particular mode of conveyance, one independent of that mode is forbidden by implication and is void. (22 Cyc.

136, and cases there cited.) The only mode prescribed by law for a long time for acquiring title to the Bitter Root Valley lands was by the Act of June 5, 1872, and the only Act under which title could be acquired to said lands especially allotted to the Indians is the Act of March 2, 1889. The Indian could not alienate nor could his trustee for the United States government until such time as an Act was passed for that purpose.

The lands of the Bitter Root Valley seem to be in a class by themselves. There was no law under which title to said lands could be acquired after the Act of June 5, 1872, except under the provisions of that Act. It was held that neither the Homestead Law nor the Timber and Stone Law was applicable to the lands in that valley until such time as a special Act of Congress was passed for the purpose of bringing the lands under the provisions of said Acts. It is true that no patents ever were delivered to the Indians to whom certain lands in the valley were allotted and to whom patents therefor were issued, but it is a matter of history that patents were issued though never delivered. There are no other Indian lands in the United States that were ever in exactly the same condition as the lands in the Bitter Root Valley. It will be remembered that General Garfield was sent to the valley for the purpose of negotiating a treaty with the Flathead Indians, so that they would give up their lands in the Bitter Root Valley and consent to be removed to the Jocko reservation; and it will also be remembered that it was always contended by Chief Charlos that he never signed said treaty and that the signature purporting to be his name which was attached to the treaty was a forgery, and it was by reason of the objections raised by him that these patents to the several allotments of the Indians in the Bitter Root Valley were not delivered and were not accepted by them.

The contention of the defendant that it went into possession under color of title is hardly borne out by the fact. Under Section 6436 of the Revised Codes, there can be no claim of color of title, for said section distinctly requires that in order to be color of title, at the time the person entered into the

possession of the property under claim of title he must found such claim upon a written instrument as being a conveyance of the property in question; and as the entry upon this land was about a year prior to the time they attempted to comply with the law of March 3, 1875, there was no written instrument at that time to give color of title to said claim. It is also held even though they had entered under color of title, that "A deed by an Indian in contravention of a treaty or grant withholding or restricting the power of alienation is not color of title and a vendee cannot acquire any right under such deed by adverse possession or estoppel." (22 Cyc. 136, and cases cited; *Morrison* v. *Linn*, 50 Mont. 396, 402, 147 Pac. 166.)

The cases cited in appellant's brief are not applicable to the case in question, for the reason that they do not have to do with or do not relate to land which was granted to the Indian without power of alienation. Suppose it to be true, as contended by the appellant, that the Indian could have brought suit for trespass during the time that he was still owner of the land. That in no wise affects this case or helps the appellant, for the reason that this is a continuing trespass, and though the Indian might have sued for damage incurred by the trespass during the time that he was entitled to possession, he could not by any such action surrender title to the land to the appellant. The plaintiff in this case has seen fit to waive the tort and sue in *assumpsit* for the value of the land taken, and has not asked any damages for the use and occupation of the land in controversy.

MR. JUSTICE HURLY delivered the opinion of the court.

This is an action to recover the value of twelve acres of land occupied by the appellant and its predecessors in interest as a right of way for a railroad across eighty acres of land, since the year 1887.

On July 5, 1873, one Trochee, a Flathead Indian, under the Act of Congress approved June 5, 1872, selected certain lands as his allotment in the Bitter Root Valley. Thereafter a

patent, containing restrictions against alienation of the land, was issued but never actually delivered to him. Later he consented to a sale thereof by the secretary of the interior, pursuant to the Act of Congress approved March 2, 1889. The respondent, under date of December 2, 1909, in accordance with the provisions of said Act of March 2, 1889, made application to purchase the tract of land on which is situated the right of way, and, having complied with the terms of purchase, patent was issued to him by the United States on March 23, 1913. On August 12, 1914, he commenced this action to recover the value of the land occupied by the defendant.

The defendant answered, admitting the foregoing, but denying that plaintiff was in the possession of the land occupied as right of way, and also denying the allegations of the complaint as to the value of the land so occupied. Six separate defenses were also set out in the answer: The first, alleging title in appellant to said right of way under the Act of Congress of March 3, 1875, granting to railroads the right of way through public lands of the United States; the second, alleging actual, open, peaceable, notorious, undisputed and exclusive adverse possession of the right of way, under claim of title; the third, fourth and fifth, alleging that plaintiff's cause of action is barred by the provisions of sections 6432, 6433 and 6436 of the Revised Codes; and the sixth, alleging that respondent is estopped and precluded from questioning the title of plaintiff to the right of way.

To this answer and to each separate defense a general demurrer was filed, which demurrer was sustained by the court as to each of said separate defenses. Thereafter a trial was had upon the issues raised by the pleadings and a verdict returned in favor of respondent, and judgment duly entered. After settlement of the bill of exceptions, appeal was taken direct from the judgment.

As we understand respondent's position, it is that Smith, by his purchase, succeeded to the rights of Trochee in the land, and that, while patent ran to Smith from the government, the

government acted merely as trustee or agent for Trochee, and that title did not again vest in the government as proprietor after the selection by Trochee; also, the use of the right of way constituted a continuing trespass, and that while Trochee might have sued for damages caused by the trespass during the time that he was entitled to possession, not having a fee-simple title and his right to alienate the land being prohibited, he could not thereby surrender title to the right of way to the railroad company, and the railroad company is liable to the present owner for the value of the land appropriated.

Section 3 of the Act of June 5, 1872, *supra*, provides: "That any of said Indians, being the head of a family, or twenty-one years of age, who shall at the passage of this Act, be actually residing upon and cultivating any portion of said lands, shall be permitted to remain in said valley and pre-empt without cost the land so occupied and cultivated, not exceeding in amount one hundred and sixty acres for each of such Indians, for which he shall receive a patent without power of alienation; Provided, that such Indian shall, prior to August first, eighteen hundred and seventy-two, notify the superintendent of Indian affairs for Montana Territory that he abandons his tribal relations with said tribe, and intends to remain in said valley: And Provided further, that said superintendent shall have given such Indian at least one month's notice prior to the date last above mentioned of the provisions of this Act and of his right so to remain as provided in this section of this Act." (17 U. S. Stats. at Large, p. 226.)

By an Act of Congress, approved March 2, 1889 (25 Stats. at Large, p. 871), it was provided "that the secretary of the interior, with the consent of the Indians severally to whom patents have been issued for lands assigned to them in the Bitter Root Valley in Montana," under the provisions of the Act of June 5, 1872, *supra*, "be, and he hereby is, authorized to cause to be appraised and sold all the lands allotted and patented to said Indians; * * * that the net proceeds from the sale of the lands herein authorized shall be placed in the Treasury to

the credit of the Indians severally entitled thereto," with authority vested in the secretary to pay the Indian patentees the purchase price received from the sale in such manner as he might deem for their best interests. Section 6 of the Act provides that in the event of the sale of such lands, the secretary of the interior shall remove the Indian whose lands may have been sold to the general reservation known as the Jocko reservation.

It is the contention of the appellant that, one of the require-
[1] ments of said Act of Congress of June 5, 1872, being that the allottee must signify his intention to abandon his tribal relations before being entitled to the benefits of said Act, his selection having been approved, Trochee became a citizen of the United States upon the passage and approval of the Act of February 8, 1887 (24 Stats. at Large, p. 390), section VI of which is as follows: "And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this Act, or under any law or treaty, and every Indian born without the territorial limits of the United States, who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens."

In the case of *Matter of Heff*, 197 U. S. 488, 49 L. Ed. 848, 25 Sup. Ct. Rep. 506, in an opinion by Mr. Justice Brewer, it was held that under said Act an Indian who has received an allotment and patent for land is no longer a ward of the government, but a citizen of the United States and of the state in which he resides, not within the reach of Indian regulations on the part of Congress, and that this emancipation from federal control cannot be set aside without the consent of the Indian or the state, nor is it affected by the provisions of the Act subjecting the land allotted to conditions against alienation, and guaranteeing him an interest in tribal property. In the

foregoing case the supreme court of the United States expressly approved the decisions of similar import rendered by the supreme courts of several of the states, as follows: *State* v. *Denoyer*, 6 N. D. 586, 72 N. W. 1014; *State* v. *Norris*, 37 Neb. 299, 55 N. W. 1086; *Wa-La-Note-Tke-Tynin* v. *Carter*, 6 Idaho, 85, 53 Pac. 106; *In re Now-Ge-Zhuck*, 69 Kan. 410, 76 Pac. 877; *United States* v. *Rickert*, 106 Fed. 1, 5; *Farrell* v. *United States*, 110 Fed. 942, 947, 49 C. C. A. 183; *Boyd* v. *State of Nebraska* (*Thayer*), 143 U. S. 135, 162, 36 L. Ed. 103, 12 Sup. Ct. Rep. 375.

That the Indians to whom allotments were made in the Bitter Root Valley were recognized as citizens by the secretary of the interior and the attorney general of the United States is plainly implied in the report of General Henry B. Carrington (approved by the secretary of the interior), agent of the Interior Department and special attorney for the government, acting in those capacities in obtaining the consent of the Indians to the sale of their lands by virtue of the Act of Congress of March 2, 1889, *supra*. (See Report of the Secretary of the Interior, Vol. 12, Senate Executive Doc., 1889–90; Doc. No. 221, 51st Congress, First Session.)

While it is true, as appears from General Carrington's report, that the patents to such Indians were never actually delivered to the allottees (and it is conceded that none was delivered to Trochee), Trochee took the necessary steps to, and did, acquire an allotment, thereby becoming a citizen of the United States.

The said Act of February 8, 1887, was amended on May 8, 1906 (24 Stats. at Large, 390, as amended by 31 Stats. at Large, 1447; 34 Stats. at Large, 182; 3 Fed. Stats. Ann., 2d ed., p. 830), so that citizenship does not follow allotment, but is dependent upon the issuance of the second or final patent, *etc.* While not important here, it has been held that this amendment was not retroactive. (See *State* v. *Lott*, 21 Idaho, 646, 123 Pac. 491.)

It has been repeatedly held that by virtue of the Act of February 8, 1887, *supra*, Indians who have severed their tribal relations and taken allotments are citizens and entitled to in-

stitute or defend actions of ejectment or trespass in state or federal courts, regardless of the prohibition against the alienation of the lands obtained under their allotment. (*Smith* v. *Mosgrove*, 51 Or. 495, 94 Pac. 970; *Wa-La-Note-Tke-Tynin* v. *Carter, supra; Carter* v. *Wann*, 6 Idaho, 556, 57 Pac. 314; *Bown* v. *Anderson* (Okl.), 160 Pac. 724; *Bird* v. *Terry*, 129 Fed. 472.)

With exceedingly few exceptions, and those often founded [2] upon peculiar situations, the rule is well established that where land is taken by a corporation authorized to exercise the right of eminent domain, the right to compensation for damages accrues to the owner at once and does not pass to a subsequent purchaser by the mere conveyance of the land. (See numerous cases cited in Decennial Digest, Eminent Domain, 153, 284.)

In *Roberts* v. *Northern Pac. R. R. Co.*, 158 U. S. 1, 39 L. Ed. 873, 15 Sup. Ct. Rep. 756, the court said: "So far as those portions of the lands described in the bill of complaint consist of parcels held and used by the railway company for the necessary and useful purposes of their road as a public highway, it is obvious that the title and possession thereof cannot be successfully assailed by the appellants. The latter became purchasers long after the railroad company had entered into visible and notorious possession of these portions of the lands, and had constructed the roads, wharves and other improvements called for by their contract with the county. It is well settled that where a railroad company, having the power of eminent domain, has entered into actual possession of land necessary for its corporate purposes, whether with or without the consent of the owner of such lands, a subsequent vendee of the latter takes the land subject to the burthen of the railroad, and the right to payment from the railroad company, if it entered by virtue of an agreement to pay, or to damages, if the entry was unauthorized, belongs to the owner at the time the railroad took possession." (See, also, *Northern Pac. Ry. Co.* v. *Murray*, 87 Fed. 648, 31 C. C. A. 183; *Green* v. *South Bound R. Co.*, 112

Ga. 849, 38 S. E. 81; *Kakeldy* v. *Columbia & P. S. R. Co.*, 37 Wash. 675, 80 Pac. 205; *Maffet* v. *Quine*, 93 Fed. 347.)

In *Kakeldy* v. *Columbia & P. S. R. Co.*, *supra*, the plaintiff purchased the land in suit after the construction of the road. Speaking of plaintiff's cause of action the court said: "The deeds under which he claims are in evidence. They contain no transfer to him of any right of action which his grantor may have had against the railroad company, if he had any such. An owner of land who stands by and without protest sees a railroad constructed thereon is estopped thereafter to maintain an action in ejectment or a suit for injunction to prevent the operation of the road. His remedy is limited to an action for damages for his compensation. * * * " (*Little Bill* v. *Swanson*, 64 Wash. 650, 117 Pac. 481; *Northern Pac. R. Co.* v. *Smith*, 171 U. S. 260, 43 L. Ed. 157, 18 Sup. Ct. Rep. 794; *Donohoe* v. *El Paso & S. W. R. Co.*, 11 Ariz. 293, 94 Pac. 1091; affirmed, 214 U. S. 499, 53 L. Ed. 1060, 29 Sup. Ct. Rep. 698; *Northern Pac. Ry. Co.* v. *Murray*, *supra*.)

In *Roberts* v. *Northern Pac. R. R. Co.*, *supra*, the court said: "The conclusion, therefore, seems warranted that, as to those portions of the lands in question which are occupied and used by the railroad company, the county (plaintiff's grantor) having stood by for years and permitted the company to proceed in the construction of its road and appurtenances at a vast expense, and having accepted large sums of taxes, would be estopped from interfering with the possession of the railroad company. *A fortiori*, it follows that Roberts, buying with notice, could not maintain either trespass or ejectment for such portions, nor would he, as such purchaser, be entitled to recover damages for the occupation thereof. The foregoing observations apply only to those portions of the lands in question which have been actually occupied and used by the railroad company for corporate purposes, or, in other words, to such lands as the railroad company could have condemned by the exercise of its right of eminent domain."

In this action no question is involved concerning ejectment or damages other than those arising from the actual appropriation of the land occupied as a right of way.

Plaintiff is seeking to recover the value of the land appropriated. This is a right which was possesssed only by Trochee, and there is no claim upon plaintiff's part that Trochee or the government assigned to him the right to recover such damages. His right is based solely upon the patent from the government, which, concededly, is silent as to the right of way. No assignment of his right to such damages having been made to the plaintiff, he should not recover herein.

The railroad company went into possession in 1887, and ever since has remained in open and notorious possession, having been in such possession approximately twenty-seven years at the time this action was commenced. So far as disclosed by the record (and the separate defenses must be taken as true upon this appeal, because standing upon the demurrers thereto), no claim or demand of any kind was made upon the railroad company, either by Trochee or the government, or the present plaintiff, prior to the issuance of the patent. Though, if Trochee or the government had seen fit, an action in trespass or ejectment could have been brought against the company at any time, unless barred by estoppel or limitation. That the plaintiff purchased with notice of defendant's occupancy there can be no question.

Conceding, though not deciding, that an action for damages in the nature of compensation could not have been maintained by Trochee because of the restrictions upon his right to convey, prior to the issuance of final patent, we fail to see how this could benefit plaintiff. He, not having been the owner at the time of the taking of the land, may not now maintain an action for such damages.

The plaintiff not being in position to recover upon his cause of action for the reasons stated, it is unnecessary to pass upon the other questions raised.

The judgment is reversed, with directions to the district court to dismiss the action.

Reversed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, MATTHEWS and COOPER concur.

GALLATIN VALLEY ELECTRIC RY., APPELLANT, v. NEIBLE ET AL., RESPONDENTS.

(No. 4,056.)

(Submitted November 11, 1919. Decided December 29, 1919.)

[186 Pac. 689.]

Railroads — Eminent Domain — Damages — General Neighborhood Benefits—Evidence—Offers Made to Owner—Inadmissibility—Judgment—Compound Interest—Harmless Error.

Eminent Domain—Railroad Right of way—General Neighborhood Benefits—Evidence—Inadmissibility.

1. Where land is taken by a railroad company for right of way purposes, general neighborhood benefits resulting to the owner in common with others from the construction of the road, the building of a depot, elevator, *etc.*, but not peculiar or special to himself, may not be set off against the damages resulting to him from the taking of the land; hence evidence of such general benefits was properly excluded.

[As to the deduction of benefits in assessing damages in eminent domain proceedings, see notes in 13 Ann. Cas. 603; 19 Ann. Cas. 859; Ann. Cas. 1914B, 478.]

Same—Damages—Computation.

2. Under section 7342, Revised Codes, damages suffered by the owner of land taken by condemnation proceedings for a railroad right of way must be computed as of the day of the summons.

Same—Judgment—Compound Interest.

3. A judgment in condemnation proceedings arrived at by deducting from the amount awarded to the owner of the land taken the sum paid into court at the time the plaintiff railroad company was let into possession, computing interest upon the balance so ascertained from that date to the date of entry of judgment and adding it to such balance, the sum total to bear interest at eight per cent per annum until paid, was not objectionable as allowing compound interest.

Same—Offers Made to Owner—Evidence—Harmless Error.

4. Error in permitting the husband of defendant in condemnation proceedings to testify that an offer of $125 per acre of the land in

question had been made, *held* to have been rendered harmless by an instruction to the jury not to consider any evidence of offers made and refused at any time.

Appeal from District Court of Gallatin County; Ben B. Law, Judge.

PROCEEDINGS in eminent domain by the Gallatin Valley Electric Railway, a corporation, against Matthias Neible and Susan B. Clark. From the judgment in favor of defendants and an order denying plaintiff a new trial, plaintiff appeals. Order affirmed, and judgment directed to be modified, and as modified, to stand affirmed.

Mr. Walter S. Hartman, for Appellant, submitted a brief, and argued the cause orally.

From the authorities below cited, we affirm the doctrine that when the land owner has been paid the full value of the land actually taken for railroad purposes, the road has been constructed, and the market value of his property remaining has been enhanced by the improvement, the rule that provides that property shall not be taken for public use without compensation first being paid has been fully satisfied; that it is to be presumed that the improvement when constructed will continue to be operated as constructed and not dismantled and abandoned; that the property is benefited if it is enhanced in value by the construction, maintenance and operation of the improvement, whether such enhancement be by reason of special facilities afforded the land owner for transportation purposes or by reason of an increase in value to the lands, common to other lands in the immediate vicinity, and that the mere fact that other lands are likewise increased in value does not prevent the consideration of the enhancement in value of the lands in question. (See 10 R. C. L., sec. 140; 15 Cyc. 767, 768; *Moran* v. *Ross*, 79 Cal. 549, 21 Pac. 958; *California Pac. R. Co.* v. *Armstrong*, 46 Cal. 85; *Beveridge* v. *Lewis*, 137 Cal. 619, 92 Am. St. Rep. 188, 59 L. R. A. 581, 67 Pac. 1040, 70 Pac. 1083; *Fifer* v. *Ritter*, 159 Ind. 8, 64 N. E. 463; *Lewis* v. *City of*

Seattle, 5 Wash. 741, 32 Pac. 794; *Hilbourne* v. *Suffolk County*, 120 Mass. 393, 21 Am. Rep. 522; *Sutro* v. *Manhattan Ry. Co.*, 137 N. Y. 592, 33 N. E. 334; *Abney* v. *Texarkana S. & N. Ry. Co.*, 105 La. 446, 29 South. 890; *Baltimore & N. Y. R. Co.* v. *Bouvier*, 70 N. J. Eq. 158, 62 Atl. 868; *Brand* v. *Union Elevated Ry. Co.*, 258 Ill. 133, Ann. Cas. 1914B, 473, L. R. A. 1918A, 878, 101 N. E. 247; *Chicago, S. F. & C. Ry. Co.* v. *McGrew*, 104 Mo. 282, 15 S. W. 931; *Nelson* v. *Atlanta*, 138 Ga. 252, 75 S. E. 245; *Western Newspaper Union* v. *Des Moines*, 157 Iowa, 685, 140 N. W. 367; *Custer Township* v. *Dawson*, 178 Mich. 367, 144 N. W. 862; *Little Tarkio Drainage District* v. *Richardson*, 237 Mo. 49, 139 S. W. 576; *New York etc. Ry. Co.* v. *Siebrecht*, 73 Misc. Rep. 219, 130 N. Y. Supp. 1005; *Brainerd* v. *State*, 74 Misc. Rep. 100, 131 N. Y. Supp. 221; *Bramlett* v. *City Council of Greenville*, 88 S. C. 110, 70 S. E. 450; *Bailey* v. *Clinton*, 88 S. C. 118, 70 S. E. 446.)

Mr. George Y. Patten, for Respondent, submitted a brief and argued the cause orally.

It is universally held that only benefits which are peculiar to the land in controversy, and not such as are general to lands in the neighborhood, are to be allowed as offsets against the damages caused by the severance. This rule, moreover, is not necessarily affected by the other rule, announced by some of the courts, that special benefits which are allowable do not cease to be such because they also accrue to other lands not damaged by the railroad. This latter rule, however, must be taken in a very restricted sense, if it can be justified as a correct statement of a principle at all, and can only be applied in exceptional cases, because it manifestly impinges upon the other rule just stated, which marks the fundamental distinction between benefits which are chargeable, and those which are not. Neither of these rules, however, determines, but both merely evolve, the question here as to what are the "benefits" which are special and allowable as offsets, as distinguished from those benefits which are general and are not to be allowed.

Cases containing interesting discussions of the subject of the general rule which has just been stated, that benefits must be special and peculiar to the land as distinguished from those which are general in character, are: *Guyandott Valley Ry. Co.* v. *Buskirk,* 57 W. Va. 417, 110 Am. St. Rep. 785, 50 S. E. 521; *Heninger* v. *Peery,* 102 Va. 896, 47 S. E. 1013; *Southern Illinois & M. Bridge Co.* v. *Stone,* 194 Mo. 175, 92 S. W. 475; *Lambeth* v. *Southern Power Co.,* 152 N. C. 371, 67 S. E. 921; *Whitman* v. *Boston & M. R. R.,* 89 Mass. (7 Allen) 313; *Cross* v. *Plymouth County,* 125 Mass. 557; *French* v. *Lowell,* 117 Mass. 363.

It is well established that the construction of depots or stations, or similar conveniences, within the vicinity, is not a special benefit which can properly be allowed. (*Washburn* v. *Milwaukee etc. R. Co.,* 59 Wis. 364, 18 N. W. 328, 333; *Pochila* v. *Calvert etc. Ry. Co.,* 31 Tex. Civ. App. 398, 72 S. W. 255; *Kirby* v. *Panhandle & G. Ry. Co.,* 39 Tex. Civ. App. 252, 88 S. W. 281; *International & G. N. R. Co.* v. *Bell,* 62 Tex. Civ. 117, 130 S. W. 634; *Sloan* v. *New York El. R. Co.,* 63 Hun, 300, 17 N. Y. Supp. 769; *Illinois, I. & M. R. Co.* v. *Borms,* 219 Ill. 179, 76 N. E. 149; *Roberts* v. *Board of Brown County Commrs.,* 21 Kan. 247; *Hempstead* v. *Salt Lake City,* 32 Utah, 261, 90 Pac. 397; *Little Rock & Ft. S. Ry. Co.* v. *Allister,* 68 Ark. 600, 60 S. W. 953; *Sullivan* v. *North Hudson County R. R. Co.,* 51 N. J. L. 518, 18 Atl. 689; *Pichon* v. *Martin,* 35 Ind. App. 167, 73 N. E. 1009; *Lake Roland El. Ry. Co.* v. *Frick,* 86 Md. 259, 37 Atl. 650.) No deduction is to be allowed for benefits arising from the construction and operation of the railroad. (*Union Traction Co.* v. *Pfeil,* 39 Ind. App. 51, 78 N. E. 1052.)

The general enhancement in the value of lands adjoining and in the vicinity of the railroad, due to the building of the railroad, is not a proper element of benefit to be allowed, many of the courts remarking that the owner, and not the railroad company, is entitled to this increase. (*Mahaffey* v. *Beech Creek R. R.,* 163 Pa. St. 158, 29 Atl. 881; *Shimer* v. *Easton Ry. Co.,* 205 Pa. 648, 55 Atl. 769; *Eastern Texas R. Co.* v. *Eddings,* 30

Tex. Civ. App. 170, 70 S. W. 98; *St. Louis, M. & S. E. R. Co.* v. *Continental Brick Co.*, 198 Mo. 698, 96 S. W. 1011; *Williamson* v. *Read*, 106 Va. 453, 56 S. E. 174; *Crystal City & U. R. Co.* v. *Boothe* (Tex. Civ. App.), 126 S. W. 700; *Routh* v. *Texas Traction Co.* (Tex. Civ. App.), 148 S. W. 1152; *Buckhannon & N. R. Co.* v. *Great Scott Coal & Coke Co.*, 75 W. Va. 423, 83 S. E. 1031; *Pittsburgh B. & B. R. Co.* v. *McCloskey*, 110 Pa. St. 436, 1 Atl. 555; *Mississippi Ry. Co.* v. *McDonald*, 59 Tenn. (12 Heisk.) 54.)

MR. JUSTICE HURLY delivered the opinion of the court.

This is an action by appellant to condemn a right of way for a railroad through the lands of respondents. On May 25, 1910, commissioners were appointed, who filed their report on June 7 of that year, assessing damages in favor of respondents. On June 11, 1910, the appellant gave bond to the respondents for the construction of farm crossings, fences, *etc.*, and on said date paid into court $1,265 for the benefit of respondent Clark, and likewise paid for the benefit of respondent Neible, $1,027.25, such sums being the amount of damages awarded to them respectively by the commissioners. An order was made of that date, admitting the appellant to possession of the lands sought to be condemned in the condemnation proceedings. Respondents appealed from the award of the commissioners on the sixth day of July, 1910, and received the money which had been so deposited into court as damages. On the trial of the appeal in the district court, the jury returned a verdict assessing damages in favor of the respondents, as follows: To Clark, for the value of the land taken, $1,234; severance damages, $1,500, making a total of $2,734; and to Neible, for the value of the land taken, $903; severance damages, $1,200, making a total of $2,103.

The court rendered judgment in favor of the respondents respectively, crediting upon the verdict in favor of Clark, the said sum of $1,265, paid into court for her on June 11, 1910, and rendered judgment against the appellant for the balance of

$1,469, with interest at eight per cent per annum from June 11, 1910, the date of the order letting plaintiff into possession, to the date of judgment, to wit, April 19, 1916, which interest was computed at $835.35, making a total of $2,274.35. The court likewise credited upon the verdict in favor of Neible the said sum of $1,027.25, and Neible was awarded a judgment for the sum of $1,665.08, which includes interest computed upon the same basis.

It is conceded that the judgment erroneously allowed interest to the respondents in excess of that to which they were respectively entitled, as follows: To Clark, $117.60, and to Neible, $86.15.

Upon the trial, the appellant contended that because of the [1] building of a depot, stockyards, elevator and side-tracks, a portion of which was located on the land taken from Neible, and a portion of which was immediately north of and adjoining the Clark tract, certain special benefits had accrued to the respondents by reason of the construction, operation and maintenance of the road, because of which the tracts of land in question belonging to the respondents, in common with other tracts of land immediately in the neighborhood and adjacent to the road, had been increased in value, and that by reason of these facts a special benefit had accrued to these lands which, while more or less common to the other lands immediately in the vicinity, were of special benefit to respondents' lands. All the evidence tending to show benefits to the lands of respondents by reason of the construction, maintenance and operation of the road and these improvements, was either excluded by the court, stricken out after it was admitted, or, if not stricken out, taken from the jury by instructions. The principal point raised in the arguments upon the appeal is that this evidence should have been admitted to offset the damages sustained by respondents, and that because of its exclusion and the refusal of the court to instruct the jury that such deduction should be made, a new trial should be granted. No evidence was offered,

however, tending to show that by the construction of the road or its improvements any physical benefit to the lands ensued.

In *Yellowstone Park Ry. Co.* v. *Bridger Coal Co.*, 34 Mont. 545, 115 Am. St. Rep. 546, 9 Ann. Cas. 470, 87 Pac. 963, this question was suggested, but decision thereon was reserved for subsequent determination.

The statute (Rev. Codes, sec. 7341, subd. 3) provides that the method to be pursued in offsetting benefits to the land against the damages sustained is that the commissioners shall ascertain how much the land not to be taken will be benefited by the construction, and if the benefits shall be equal to the damage assessed, the owner shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value. Section 7344 provides that upon appeal being taken, the damages to which the owner may be entitled shall be reassessed upon the same principle as prescribed for assessment thereof by the commissioners.

There is much conflict in the authorities as to what enhancement, if any, in the value of property by reason of the construction of a railroad, may be considered as a benefit to offset damages, and also as to what is the meaning of the term "benefit" in the sense that such benefit may be deducted from the damages sustained. These are frequently, and quite generally, divided into three classes: (1) General benefits, or those arising from causes which affect the whole community and perhaps raise the value of land in an entire city or town; (2) neighborhood benefits, or those accruing to a certain definite district by reason of its nearness to the improvements; (3) peculiar benefits, or those affecting a particular estate by reason of its direct relation to the improvement. (10 R. C. L. 159.)

Many of the cases maintain the doctrine as contended for by appellant: That the damages sustained by the land owner may be offset by the enhanced value of his land, construction of

depots, *etc.*, at or near thereto, *etc.;* but even where allowances are made for differences in constitutional and statutory provisions as well as the peculiar facts involved in the various cases, they cannot all be harmonized. However, it may be stated as a general rule that general and neighborhood benefits resulting to the owner in common with others may not be set off against the damages to the owner, and that the benefits which may be deducted must be special or local, or such as result directly and peculiarly to the particular tract of which a part is taken. (15 Cyc. 770.)

The rule is also thus stated in Lewis on Eminent Domain, volume 2, third edition, section 703: "It seems to the writer that nothing should be regarded as a special benefit except (1) a physical improvement of the property in question by reason of the construction of the public work for which the part has been taken, when the manner of construction is made a part of the condemnation proceedings, so that the manner of construction cannot be changed to the detriment of the property without compensation, and (2) the conferring upon the property of some right or privilege, which becomes appurtenant thereto and renders the property more valuable, and which cannot be destroyed or impaired without compensation. Unless the benefits proposed to be set off are secured to the owner by a valid title, if he may be deprived of them without compensation, by a change of construction or by a change of use and occupation, then they should not be taken into consideration. An example of the first sort of benefit is where a railroad is so constructed through property as to afford it needed drainage, provided the mode of construction which produces the drainage is so incorporated into the condemnation proceedings as to be binding upon the company. But it is manifestly wrong to allow benefits because a railroad or a highway *might* be so constructed through a tract as to afford it valuable drainage, when there is no obligation so to construct it. An example of the second sort of benefit is where a street is laid out through a tract and the abutting property acquires the valuable ease-

ments of light, air and access over the street. When the street is once established, these easements cannot be impaired or destroyed without compensation. So in states where property abutting upon a railroad is entitled to switching facilities as a matter of right, if a railroad is constructed through a tract, the right to such facilities becomes appurtenant to the parts remaining, and if this fact renders them more valuable, that is a special benefit. But in such case, the amount of benefit should be estimated in view of the fact that the right may be lost by abandonment of the railroad. But if the owner cannot demand switching facilities as a matter of right, nothing should be allowed for the possibility of obtaining them as a matter of favor. A depot near property is not a special benefit because the owner has no right to its continuance as located, and because the right to be carried on the railroad or to send or receive freight over it is a personal right and not a right appurtenant to property." (See, also, 2 Elliott on Railroads, 2d ed., sec. 989; *Guyandot Valley Ry. Co.* v. *Buskirk*, 57 W. Va. 417, 110 Am. St. Rep. 785, 50 S. E. 521; *Heninger* v. *Peery*, 102 Va. 896, 47 S. E. 1013; *Lambeth* v. *Southern Power Co.*, 152 N. C. 371, 67 S. E. 921; *Whitman* v. *Boston & M. R. R.*, 89 Mass. (7 Allen) 313; *Cross* v. *Plymouth County*, 125 Mass. 557; *French* v. *Lowell*, 117 Mass. 363.)

In *Pochila* v. *Calvert etc. Ry. Co.*, 31 Tex. Civ. App. 398, 72 S. W. 255, the court said: "Not only was the property of plaintiff and other property in the city of Bryan increased in value by the construction of the railroad, but other causes conspired to increase the value of property from twenty to twenty-five per cent, according to the testmony of the witnesses. The plaintiff was entitled to the benefit of such increase in value, but the court gave it to the defendants. Another reason assigned by the court for denying the plaintiff the benefit of any increase in value that his property may have sustained was that the defendants had built a depot in the vicinity, which was of that peculiar and special benefit to the property which might be taken into consideration in offset in the estimation

of the damages. No such peculiar benefit was shown by the evidence. The benefit caused by the building of the depot affected all property alike in its neighborhood, and was not peculiar to the plaintiff's property. In order to be peculiar to a piece of property, the benefit must affect it directly, so as not to be shared by other property in the neighborhood, and the value of its use must be increased by improvement of the physical condition of the property." (See, also, *Washburn* v. *Milwaukee etc. Ry. Co.*, 59 Wis. 364, 18 N. W. 328, 333; *Kirby* v. *Panhandle & G. Ry. Co.*, 39 Tex. Civ. App. 252, 88 S. W. 281; *International & G. N. R. Co.* v. *Bell*, 62 Tex. Civ. 117, 130 S. W. 634; *Sloan* v. *New York E. R. Co.*, 63 Hun, 300, 17 N. Y. Supp. 769; *Illinois, I. & M. R. Co.* v. *Borms*, 219 Ill. 179, 76 N. E. 149; *Hempstead* v. *Salt Lake City*, 32 Utah, 261, 90 Pac. 397; *Little Rock etc. Ry. Co.* v. *Allister*, 68 Ark. 600, 60 S. W. 953.)

In *Roberts* v. *Board of Brown County Commrs.*, 21 Kan. 247, the court said: "A benefit must be founded upon something which increases the actual or usable value of the land, as well as the market or salable value thereof, and not such as increases merely the market or salable value alone. Increased value founded upon merely increased facilities for travel and transportation by the public in general is not the kind of increased value which may be taken into consideration in reducing the damages to be awarded to the land owner. That kind of increased value is too indirect and too remote from the original cause. * * * Besides, it is a kind of increased value which is common to the whole community in general, and to each individual thereof to a greater or less extent; and it has no relation to the use of the land as land, but it is merely an increased market value founded upon the extraneous circumstances of increased facilities for public travel and transportation." And the general enhancement of values in land in the vicinity because of the construction of the road is not a proper element of benefit to be allowed. (*Mahaffey* v. *Beech Creek R. R.*, 163 Pa. St. 158, 29 Atl. 881; *Shimer* v. *Easton Ry. Co.*, 205 Pa.

St. 648, 55 Atl. 769; *Eastern Texas R. Co.* v. *Eddings*, 30 Tex. Civ. App. 170, 70 S. W. 98; *St. Louis, M. & S. E. R. Co.* v. *Continental Brick Co.*, 198 Mo. 698, 96 S. W. 1011; *Williamson* v. *Read*, 106 Va. 453, 56 S. E. 174; *Crystal City & U. R. Co.* v. *Boothe* (Tex. Civ.), 126 S. W. 700; *Routh* v. *Texas Traction Co.* (Tex. Civ.), 148 S. W. 1152; *Buckhannon & N. R. Co.* v. *Great Scott Coal & C. Co.*, 75 W. Va. 423, 83 S. E. 1031; *Pittsburgh B. & B. R. Co.* v. *McCloskey*, 110 Pa. St. 436, 1 Atl. 555; *Mississippi Ry. Co.* v. *McDonald*, 59 Tenn. (Heisk.) 54.)

Further, under section 7342, *supra*, damages are to be [2] computed as of the date of the summons in the condemnation proceedings. (*Butte Electric Ry. Co.* v. *Mathews*, 34 Mont. 487, 87 Pac. 460; *Montana Ry. Co.* v. *Freeser*, 29 Mont. 210, 74 Pac. 407.)

As said in *Guyandot Valley Ry. Co.* v. *Buskirk*, *supra*: "It must be perfectly manifest that in every case of a projected railroad, there is an appreciation in values of real estate all along the proposed line before any condemnation proceedings are instituted, and since the market value at or near the date of the institution of such proceedings is the measure of compensation, the enhancement due to the prospect of the construction of the railroad must have entered into the market value of the land, and the land owner obtains it because he takes the market value at that time, not at a date prior to the announcement of the intent to construct the road."

Mantorville Ry. etc. Co. v. *Slingerland*, 101 Minn. 488, 118 Am. St. Rep. 647, 11 L. R. A. (n. s.) 277, 112 N. W. 1033, is a very illustrative case, in which the authorities from many jurisdictions have been gathered and where the rules prevailing in such jurisdictions are fully commented upon and distinguished. There it was contended by the railroad company that the construction of the road would make accessible certain quarries belonging to the land owner, which would be of considerable value because of transportation facilities, whereas, without the road, they were of little or no value. The court said: "In the case at bar the possibility or the probability that the

railroad company would construct or maintain stub-tracks or permit switch connections whereby defendant's quarries would make his land valuable is not a special benefit to be offset against the value of the part of his land taken by the railway company or damages to the remainder. That benefit accrued to the community in general. It was *such a benefit as defendant might have received if the railroad had been constructed through the country, and had not crossed his farm.* * * * If, for example, the railroad company had run along the boundary line of his neighbor's land, that neighbor would have had identical advantages and would have paid nothing. The defendant is not required to pay in part for the same thing which his neighbor received *gratis*. The benefit was not direct nor local. The construction of the road did not physically alter defendant's lands to his advantage. It did not open a quarry, as by making a cut and exposing the stone. In this connection it is to be noted that this entire section of the state is underlaid with limestone, whose value is largely determined by its quality. A quarry is not so common as a field, but is of so frequent occurrence that the benefit of transportation facilities accrues to property owners quite generally and is highly uncertain, if not speculative. The benefit was contingent, and dependent upon the right of the railroad company to permit or refuse direct connection with it. Indeed, it might never accrue in fact. If it existed at all, the benefit was constructive, not actual. Any use the land owner might make of any spur-track or switch connection would be merely permissive, and subject to the paramount right of the railroad company. * * * It would be an unjust discrimination against this land owner to require him to pay for the privilege of paying the plaintiff for the transportation of his freight. The trial court was clearly right."

Common experience indicates that the line, side-tracks, switches, elevators, *etc.*, are extended or erected in certain places, not with the view of benefiting adjoining land owners,

but because of conditions which lead the appropriator to deem the site or sites selected as affording it desirable locations, primarily with the view of benefits to itself, financially and otherwise. The railway company may not carry on its business without these adjuncts, the permanence of the location and continued use of which are matters resting almost entirely in its hands. Its appropriation is for establishing and maintaining a complete line of railway, which means more than the mere construction of a grade, with ties and rails laid thereon. To so carry on its business, it must have depots, side-tracks, *etc.*, at intervals for its own benefit, and the incidental benefit of the public, for which benefit the general public contributes only by its use of the facilities offered. We do not concur in the reasoning of those cases which maintain that the land owner whose land is so appropriated must suffer a diminution in the damages he has sustained by reason of the benefits which he receives only as a member of the general public.

The statute is coercive, that is: Upon the necessity of the appropriation being shown, the land owner may be compelled to give up his lands for the superior use, whether he consents or not. To further hold that, in addition to yielding his land, he must be charged by the appropriator for benefits not peculiar to himself, but common to the general public, would, in effect, be taking his property without due process of law, and the same in effect, as compelling him by judicial mandate to donate such sum for the construction of the road, or, stated in another manner, to deduct that much from the amount which is found necessary to compensate him, in return for which he receives only that which is common to all who reside in the vicinity. As stated in *Guinn* v. *Ohio River R.*, 46 W. Va. 151, 157, 76 Am. St. Rep. 806, 33 S. E. 87, this in effect is requiring one to pay for another's benefit.

The trial court, therefore, committed no error in excluding appellant's evidence as to enhancement of value of the land by reason of the construction of the road and the improvements in question, as they were not special benefits to re-

spondents' lands, nor entitled to be set off against respondents' damages.

Counsel cites the case of *Eby* v. *City of Lewistown*, 55 Mont. 113, 173 Pac. 1163, but the benefits involved in that case are of a different nature from those herein.

In the judgment, the court, after deducting from the amount [3] awarded each respondent the sum paid into court at the time appellant was let into possession of the lands, computed interest upon the balance from that date to the date of entry of judgment, and, as to each respondent, added the interest to such balance, making a total judgment for Clark of $2,274.35, and for Neible in the sum of $1,665.08. It is contended by appellant that the judgment should have merely provided that appellant should pay respondents the difference between the amounts awarded them and the amounts paid into court, with interest upon such sums from the date appellant was let into possession of the lands until paid, and that by the method adopted by the court, the interest is compounded.

In *Helena Power Transmission Co.* v. *Spratt*, 40 Mont. 254, 106 Pac. 5, the judgment provided for interest in the manner contended for by appellant. But the question here involved was not then raised nor considered.

In *Butte E. Ry. Co.* v. *Mathews, supra*, the court having instructed the jury that they might allow interest upon the amount awarded the plaintiff, a general verdict was rendered, silent as to interest. The court, therefore, assumed that interest had been allowed by the jury upon the amount awarded, refused to award interest additionally, and judgment was entered for the amount of the verdict. While the question of interest was involved upon the appeal, the question here involved was not discussed. The statute provides: "Sec. 5214. Interest is payable on judgments recoverable in the courts of this state, at the rate of eight per cent (8%) per annum, and no greater rate, but such interest must not be compounded in any manner or form."

When a debt becomes merged in a judgment, there can be no question of the right to enter the judgment for the amount thereof and accrued interest, the whole to bear interest thereafter at eight per cent per annum. (Rev. Codes, sec. 7173; *Stanford* v. *Coram*, 26 Mont. 285, 67 Pac. 1005; *Toole* v. *Weirick*, 39 Mont. 359, 133 Am. St. Rep. 576, 102 Pac. 590; *State ex rel. Dolenty* v. *Reece*, 43 Mont. 291, 115 Pac. 681.)

Clark, husband of the respondent Clark, had testified that [4] his wife's land was worth from $110 to $120 per acre. Upon redirect examination he was asked, over appellant's objection, if any offers had been made for the purchase of the land, to which he answered that he had been offered $125 per acre. Error is assigned because of the court's permitting this question. That this ruling was erroneous is without question. (*Yellowstone Park Ry. Co.* v. *Bridger Coal Co., supra; Helena Power Transmission Co.* v. *McLean*, 38 Mont. 388, 99 Pac. 1061.) However, by the court's Instruction No. 6, the jury were told that they were "not to consider any statement in evidence, if any there be, of offers made and refused at any time," *etc.* It is apparent that the jury disregarded the evidence as to the offer. While it would have been better practice to specifically refer to the evidence in question, there having been no other evidence of a similar nature in the record, the jury must have understood the instruction as applying to Judge Clark's testimony.

There are some forty-two specifications of error assigned. While we have not discussed each separately, all have been considered, and we find nothing prejudicial to appellant's rights, except as hereinafter mentioned.

It being conceded that the judgment in favor of respondent Clark is $117.60 in excess of that to which she is entitled, and in favor of respondent Neible $86.15 in excess of that to which he is entitled, the judgment should be modified accordingly.

The order overruling the motion for a new trial is affirmed, and the cause is remanded to the district court, with direction to modify the judgment as herein indicated, and when so modi-

fied it will stand affirmed, each party to pay his own costs of the appeal.

Remanded with directions.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, MATTHEWS and COOPER concur.

FARMERS' CO-OPERATIVE ASSOCIATION, APPELLANT, *v.* ROPER ET AL., RESPONDENTS.

(No. 4,068.)

(Submitted December 13, 1919. Decided December 29, 1919.)

[188 Pac. 141.]

Default Judgments—Setting Aside—Granting of Motion—When Proper—Affidavits of Merits—Verified Answer.

Default Judgments—Setting Aside—When Proper.

1. Where affidavits accompanying a motion to set aside a judgment by default, filed within ten days after its entry, showed that defendants' attorney had prepared a demurrer and intended to file it within the time allowed by statute, but on account of important business engagements elsewhere failed to do so; that during his absence and upon recalling the fact that he had not filed it, he advised one of defendants by letter where the demurrer could be found in his office, with directions to file it, *etc.*, an answer being tendered with the affidavits, the district court did not abuse its discretion in granting the motion.

Same—Answer—General Denials—Affidavits of Merits.

2. The fact that the verified answer filed by defendants with their motion to set aside their default consisted of general denials was not a ground for denying the motion, where three affidavits of merits setting forth substantial facts which, if true, constituted a complete defense to the action, were also filed, the answer itself being a sufficient affidavit of merits. (On Motion for Rehearing.)

Same—Appeal.

3. The supreme court is less inclined to reverse an order granting than one refusing an application to open a default. (On Motion for Rehearing.)

Appeal from District Court of Hill County; John W. Tattan, Judge.

ACTION by the Farmers' Co-operative Association against C. C. and Eglantine L. Roper from an order setting aside defendants' default, plaintiff appeals. Affirmed.

Messrs. Norris, Hurd & Hall and *Mr. J. K. Bramble*, for Appellant, submitted a brief; *Mr. Geo. E. Hurd* argued the cause orally.

"Courts in the transaction of business cannot be expected to consult the convenience of litigants and wait upon the private business affairs of counsel." (*Butte Butchering Co.* v. *Clarke*, 19 Mont. 306, 48 Pac. 303; *Storer* v. *Graham*, 43 Mont. 344, 116 Pac. 1011; *City of Helena* v. *Brule*, 15 Mont. 429, 39 Pac. 456, 852; *Swilling* v. *Cottonwood Land Co.*, 44 Mont. 339, 119 Pac. 1102; *Kersten* v. *Coleman*, 50 Mont. 82, 144 Pac. 1092; *Western Union* v. *Skinner* (Tex. Civ. App.), 128 S. W. 715; *Schultz* v. *Meiselbar*, 144 Ill. 26, 32 N. E. 550; *Ramey* v. *Smith*, 56 Wash. 604, 106 Pac. 160; *Green* v. *Gavin*, 11 Cal. App. 506, 105 Pac. 761; *Cavanaugh* v. *McColl*, 187 Mo. App. 256, 173 S. W. 725; *Kerby* v. *Chadwell*, 10 Mo. 392, 393; *Reynolds* v. *Greensboro etc. Machine Co.*, 153 N. C. 342, 69 S. E. 248; 25 Cyc. 939.)

The only cases which we have found, or which have been called to our attention, *contra* to the rule as above set forth are: *Citizens' Nat. Bank* v. *Branden*, 19 N. D. 489, 27 L. R. A. (n. s.) 858, 126 N. W. 102; *Krause* v. *Hobart*, 173 Iowa, 330, 155 N. W. 279; *Anderson* v. *Leonard*, 51 Ind. App. 14, 98 N. E. 891. These cases are so hopelessly in the minority as to merit little or no attention.

Mr. Frank N. Utter, for Respondents, submitted a brief.

On the question whether there is any distinction between neglect of the attorney and neglect of the litigant, the North Dakota supreme court in *Citizens' Nat. Bank* v. *Branden*, 19 N. D. 489, 27 L. R. A. (n. s.) 858, 126 N. W. 102, says: "On the point, however, of what constitutes fault on the part of the moving party and what may be said to constitute surprise, mistake, inadvertence and excusable neglect, the cases are in irreconcilable

conflict." The New York and North Carolina courts hold that, as the party himself is free from fault, the ignorance, forgetfulness or neglect of his attorney will not be imputed to him to such a degree as to prevent relief. North Carolina holds also that the neglect of an attorney to attend to his client's cases is a surprise on the part of the litigant. (*Brown* v. *Hale*, 93 N. C. 188.) Michigan has held likewise in *Loree* v. *Reeves*, 2 Mich. 133. In *Waterson* v. *Seat*, 10 Fla. 326, the court advises that before a litigant should be shut out because of neglect of his attorney, the court ought to be well satisfied that the party may maintain an action against his attorney in the matter, else he will be without remedy.

There is a distinction apparently running through all the Montana cases and all the other cases, to the effect that where there are allegations tending to show that there were other matters engaging the attention of the party or the attorney so that one or the other, or both, might in the ordinary course of business forget to attend to the matter at the proper time, the lower court has either set aside the judgment and been sustained by the higher court, or, if it failed to set aside the judgment, has been reversed by the higher court.

MR. JUSTICE COOPER delivered the opinion of the court.

The complaint in this action was filed in the court below December 20, 1916; service of summons obtained on C. C. Roper, one of the defendants, on that day, and on defendant Eglantine L. Roper on December 28. No appearance having been made by the former, on January 10, 1917, his default was taken, and on January 13 final judgment in the sum of $1,978.91 rendered and entered against him. On January 20, 1917, he filed a motion to set aside his default, supported by his own affidavit, the affidavit of his codefendant, and the affidavit of his attorney, R. E. Hammond. On March 17, 1917, the district court, upon the proof presented, made the order setting aside the default from which plaintiff appeals.

The affidavit of C. C. Roper discloses that on the date of [1] service of summons he employed R. E. Hammond, an attorney at law residing at Havre, Hill county, to represent him in the defense of said action; that after he had fully informed said Hammond of all the facts in his case, he was advised by him that he had a good defense upon the merits; that he would prepare, serve and file a demurrer to the complaint in ample time to protect affiant; that said Hammond had long been a practitioner before the United States Land Office at Havre, and was then exceedingly busy, doing an unusual amount of work on behalf of applicants for entry under the "640 Acre Homestead Law," which had just become effective, and because of important business was obliged to leave the state temporarily; that affiant was informed and believed that prior to the departure of his said attorney, and at a time when he was not in default, his said attorney had prepared, served and filed a demurrer to the complaint, and did not learn that he had inadvertently failed to do so until January 17, 1917; that said R. E. Hammond is insolvent, and the damage caused by his inadvertence cannot be collected by reason thereof. It further states that he has also fully and fairly stated all the facts in the case to his present attorney, F. N. Utter, and is advised by him that he has a good defense upon the merits.

The affidavit of Eglantine L. Roper sets forth substantially the same facts, and in addition thereto the following: That she had employed said R. E. Hammond to represent her in said action; that he had advised her that the interposition of a demurrer to the complaint would be proper, and later, on or about January 9, 1917, had told her that he had "attended to the matter and that everything had been taken care of," and that she believed said statement until January 17 when she was informed by letter from Hammond that the demurrer he had prepared was in a certain place in his office, describing it; that she made search and found it in the place designated.

With the affidavits, an answer was tendered by C. C. Roper, denying all the allegations of the complaint. Affidavits were

also filed denying that defendants had at any time entered into the agreement set forth in the complaint, and alleging affirmatively other matters material to a defense to the action upon the merits.

An affidavit was also filed by R. E. Hammond, confirming substantially many of the facts set forth in the affidavits of the defendants, and further stating that in his opinion a demurrer was a proper and necessary pleading to challenge the sufficiency of the complaint because its averments were indefinite and uncertain; that he first recalled that he had not filed the demurrer while en route to Washington, D. C., and immediately wrote a letter informing defendant Eglantine L. Roper "where the demurrer could be found in his office, and requested her to file the same." None of the facts set forth in the affidavits above referred to are controverted, appellant contenting itself with an attack upon their sufficiency to warrant the district court in setting aside the default.

Did the court below abuse its discretion in opening up the default of defendant and permitting him to defend upon the merits? In *Nash* v. *Treat*, 45 Mont. 250, Ann. Cas. 1913E, 751, 122 Pac. 745, Chief Justice Brantly, for this court, laid down the rule that "when the motion is made promptly and is supported by a showing which leaves the court in doubt or upon which reasonable minds might reach different conclusions, the doubt should be resolved in favor of the motion." By section 6589 of the Revised Codes, the duty to "relieve a party or his legal representative from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect" in a proper case, is imposed upon the district court, and the presumption that its discretion has been properly exercised is always present in cases of this character. "Whether it [the default] should have been set aside was a matter within the sound legal discretion of the court below, and with its determination we may not interfere, unless there was a manifest abuse of such discretion." (*Donlan* v. *Thompson Falls C. & M. Co.*, 42 Mont. 257, 112 Pac. 445, citing

many cases from the first to the fortieth of the Montana Reports.) Even in the case of *Lovell* v. *Willis*, 46 Mont. 581, Ann. Cas. 1914B, 587, 43 L. R. A. (n. s.) 930, 129 Pac. 1052, where the action of the court below in setting aside a default was reversed, this court, in its majority opinion, remarked: "If the affidavit had made a disclosure of facts showing that the character of defendant's business was such as to absorb his attention and was so pressing that the average man would, under similar circumstances, have been likely to forget his other important interests, the conclusion of the court thereon might have been justified." The showing here made, we are satisfied, fully met all the requirements of the statute, and accommodates itself to all the expressed views of this court upon the matter of relief in the circumstances contemplated by the Code section referred to. (*Greene* v. *Montana Brewing Co.*, 32 Mont. 102, 79 Pac. 693; *Thomas* v. *Chambers*, 14 Mont. 423, 36 Pac. 814; *Pengelly* v. *Peeler*, 39 Mont. 26, 101 Pac. 147.)

In *Collier* v. *Fitzpatrick*, 22 Mont. 553, 57 Pac. 181, it is said: "Each case in which the court is asked to set aside a judgment upon the ground of excusable neglect in the moving party must be decided upon its own facts. The design and purpose of the statute is to further the administration of justice so that the very right upon the merits may be determined, and to that end to grant relief from excusable neglect in cases where diligence is shown in applying promptly for the relief sought, provided the opposite party be not deprived of any advantage to which he may properly be entitled."

The court committed no abuse of discretion in entering the order appealed from, and it is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and MATTHEWS concur.

ON MOTION FOR REHEARING.

(Submitted January 16, 1920. Decided March 13, 1920.)

MR. JUSTICE COOPER delivered the opinion of the court.

In appellant's petition for a rehearing we find the following:
[2] "As we construe the effect of the decision in the case at bar, hereafter when a defendant desires to set a default against him aside, all that will be necessary for him to do in the matter of showing that he has a defense upon the merits is to tender a general denial of the allegations set forth in the complaint of the plaintiff. If the rule stated in the *Pearce* and *Donlan Cases* has been overruled by this court as to the subject matter under consideration, then we submit that this court should so state, so that district courts and practicing attorneys may not be in a quandary as to the law upon the subject matter under discussion. * * * Under the rule stated in the opinion in the case at bar, the provisions of the law relative to entering the defaults of defendants, for practical purposes, becomes of no force or effect."

Counsel in their petition for a rehearing overlook the fact that while the answer filed consisted merely of general denials of all the allegations of the complaint it was accompanied by three affidavits setting forth substantial facts, which, if true, constitute a complete defense upon the merits. In another respect, too, the present case differs from the cases relied upon by counsel, in that, before the time for the appearance of defendant had expired, they were told by their attorney that "everything had heen taken care of." Upon the truth of this statement the defendants relied, assuming, as they had a right to do, that their appearance had been entered and that they were not then in default. Because of the statement of counsel and the absence of negligence on the part of defendants themselves, the district court rightfully allowed them a trial upon the merits. This was in complete harmony with the spirit of the statute and the legislative perspective in its enactment. In *Scilly* v. *Babcock*, 39 Mont. 536, 104 Pac. 677, counsel for defendant, after being retained, entered upon a

political campaign and forgot the case entirely; and for aught that appears, the defendant himself evinced no greater interest in his defense.

Neither is there merit in the contention that the court should have refused to set the default aside because the proffered answer consisted merely of general denials. In *Merchants Co.* v. *Los Angeles*, 128 Cal. 619, 61 Pac. 277, it is said: "The verified answer was served with the notice of motion and became a part of the moving papers. It contained specific denials of the material allegations of the complaint, and also affirmative matter which, if true, was a complete defense to the action. It was 'duly verified,' and was an answer for each and all of the defendants. It was, therefore, of itself a sufficient affidavit of merit." (See, also, *Smith* v. *McCormick*, 52 Mont., on rehearing, at p. 326.)

It is obvious, that in the determination of matters of this kind, [3] the trial court possesses advantages superior to those enjoyed by this court. Hence it is that this court will be less inclined to reverse an order granting, than one refusing, an application to open a default. This distinction counsel have wholly failed to observe. The complaint alleges an agreement upon the part of defendants to sell, and plaintiffs to purchase, 4,000 bushels of wheat at the price of $1.07 per bushel—an allegation the answer denies. The affidavits of merits deny the making of any agreement whatsoever concerning a sale of wheat, or that defendants ever offered, agreed or promised to sell to plaintiff any wheat at all; set forth the circumstances attending the deposit of 120 bushels intended only for storage in the elevator reputed to belong to plaintiff, an offer on the part of defendants to sell the same to plaintiff for the current market price on said day of $1.80 per bushel, and the refusal by plaintiff of that offer. This showing of a defense raised at least a doubt in the mind of the judge of the district court whether justice would not be better subserved by permitting the case to be tried upon its merits, rather than to deny defendants a trial altogether.

By a casual glance at the cases counsel insist we have overruled, it will appear that relief was denied because the answer

tendered consisted of mere general denials, unsupported by allegations of fact sufficient to enable the court to test the efficacy of the proposed defense. In the case of *Pearce* v. *Butte Electric Ry. Co.*, 40 Mont. 321, 106 Pac. 563, the opinion states that no affidavit of merits whatever was filed. In *Vadnais* v. *East Butte etc. Co.*, 42 Mont. 543, 113 Pac. 747, this statement appears in the opinion: "There is not a word in this entire record to indicate that the defendant had or has any defense whatever to plaintiff's cause of action. There was not any answer tendered, and the affidavit is silent upon the subject." In *Donlan* v. *Thompson Falls etc. Co.*, 42 Mont. 257, 112 Pac. 445, it appears that defendant tendered no answer, but "contented itself with asking for additional time to answer." On page 267 this language will be found in the opinion: "Nowhere does it appear that the defendants have a meritorious defense to the action."

We are satisfied that our previous rulings upon the subject matter involved remain unaffected by anything we have said herein, and that the petition for a rehearing should be, and is, denied.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and MATTHEWS concur.

HANSEN, RESPONDENT, v. POCK, APPELLANT.

(No. 4,058.)

(Submitted December 11, 1919. Decided January 2, 1920.)

[187 Pac. 282.]

Physicians and Surgeons—Negligent Treatment of Patient—Damages—Liability—Rule—Appeal and Error—Briefs.

Physicians and Surgeons—Treatment—Degree of Skill to be Exercised—Rule.

1. When one holds himself out as a physician or surgeon, whether licensed or not, and accepts employment as such to treat a patient, he assumes toward the latter the obligation to exercise such reasonable care and skill in that behalf as is usually exercised by physicians or surgeons of recognized schools who practice in the community in which he resides, having due regard to the condition of medical or surgical science at that time.

Same—Unjustifiable Treatment of Patient—Liability of Chinese Doctor.

2. *Held*, under the above rule, that a Chinese herb doctor who held himself out as able to cure any kind of chronic disease was liable in damages to the widow of a patient who died after treatment for disease of the kidneys by defendant, when in fact he was, and had been for some twenty years, suffering from pulmonary tuberculosis, which treatment could not be justified by the rules of recognized schools of medicine.

[As to the degree of care and skill required of physicians, see notes in 1 Ann. Cas. 306; 14 Ann. Cas. 605.]

Appeal—Refusal of Offered Instruction—Briefs.

3. Unless counsel in appellant's brief points out in what respect there was error in refusing an offered instruction and wherein appellant suffered prejudice by the alleged error, the assignment will be disregarded.

Appeal from District Court of Silver Bow County, in the Second Judicial District; Jos. C. Smith, a Judge of the Fifth District, presiding.

ACTION by Minnie Hansen, as executrix of the estate of Rasmus Hansen, deceased, against Huie Pock. Judgment for plaintiff. Defendant appeals from it and an order denying a new trial.

Affirmed.

Mr. W. E. Carroll, for Appellant, submitted a brief; *Mr. Wellington D. Rankin*, of Counsel, and *Mr. Carroll* argued the cause orally.

If a physician adopted a treatment not of any particular school in the abstract, but of his own particular school, which he publicly professed and practiced, and the medical testimony offered by the plaintiff in an action against him for malpractice related to treatment prescribed by a different school, such testimony should be weighed, not alone with regard to bias or prejudice influencing the testimony of the witnesses, but with regard to bias or prejudice which might influence or malign the jury in favor of one school rather than the other. (*Force* v. *Gregory*, 63 Conn. 167, 38 Am. St. Rep. 371, 22 L. R. A. 343, 27 Atl. 1116.)

Thompson on Negligence, section 6711, says: "The implied agreement of the physician or surgeon is that no injurious consequences shall result to his patient from want of proper skill, care or diligence. If lack of skill or care is not the proximate cause of an injury to a patient, there is no breach of the physician or surgeon's obligation, and there can be no recovery." (Citing *Ewing* v. *Goode*, 78 Fed. 442; *Lamphier* v. *Phipos*, 8 Car. & P. 475.)

Each school of medicine is entitled to practice in its own way, and because one does not use the other's methods will not constitute malpractice. (*Ennis* v. *Banks*, 95 Wash. 513, 164 Pac. 58.) The question whether there was or was not negligence is one of law for the court. (*Adolay* v. *Miller*, 60 Ind. App. 656, 111 N. E. 313.) Permitting treatment by a physician after being informed or becoming fully aware of his want of skill is contributory negligence, which will bar an action for resulting injuries. (*Lorenz* v. *Jackson*, 88 Hun, 200, 34 N. Y. Supp. 652; *Gates* v. *Fleischer*, 67 Wis. 504, 30 N. W. 674.)

The attention of the court is especially called to the case of *Dorris* v. *Warford*, 124 Ky. 768, 9 L. R. A. (n. s.) 1090, 100 S. W. 312, as it appears in 14 Ann. Cas., page 602, as bearing upon the instructions in the case at bar.

Mr. W. E. Keeley, Mr. M. H. Canning, Mr. P. E. Geagan and *Mr. E. P. Kelly*, for Respondent, submitted a brief; *Mr. Keeley* argued the cause orally.

The law relative to the case is summed up in the following: "A school of medicine, to be entitled to recognition * * * must have rules and principles of practice for the guidance of all of its members as respects principles, diagnosis and remedies, which each member is supposed to observe in any given case. A class of practitioners who have no fixed principles or formulated rules for the treatment of diseases must be held to the duty of treating patients with the ordinary skill and knowledge of physicians in good standing." (22 Am. & Eng. Ency. of Law, 2d ed., 801, quoted and approved in *Grainger* v. *Still*, 187 Mo. 197, 70 L. R. A. 49, 55, 85 S. W. 1114. See, also, *Williams* v. *Poppleton*, 3 Or. 139; *Nelson* v. *Harrington*, 72 Wis. 591, 7 Am. St. Rep. 90, 1 L. R. A. 719, 40 N. W. 228; *Longan* v. *Weltmer*, 180 Mo. 322, 103 Am. St. Rep. 573, 64 L. R. A. 969, 79 S. W. 655 (magnetic healer); *Lynch* v. *Davis*, 12 How. Pr. (N. Y.) 323; *Almond* v. *Nugent*, 34 Iowa, 300, 11 Am. Rep. 147; *McCandless* v. *McWha*, 22 Pa. St. 261; *Rex* v. *Long*, 4 Car. & P. 398; *Rex* v. *Van Butchell*, 3 Car. & P. 629; *Carpenter* v. *Blake*, 60 Barb. (N. Y.) 488; Shearman & Redfield on Negligence, 2d ed., sec. 437.)

It has always been held that because the rules whereby damages in a malpractice case are to be measured are vague and uncertain, the jury are the proper judges of the amount of damages to be allowed, and unless there is something in the case showing that the jury, in their determination, were influenced by passion, prejudice or some other improper motive, the court will not interfere. (*Chamberlain* v. *Porter*, 9 Minn. 260; *Howard* v. *Grover*, 28 Me. 97, 48 Am. Dec. 478.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action by Rasmus Hansen to recover damages alleged to have been suffered by him through negligent and careless treatment

by the defendant, who is a Chinese herb doctor and physician. From a judgment in favor of Hansen and from an order denying a new trial, defendant has appealed. After the cause was removed to this court, Hansen died, and the name of Minnie Hansen, his executrix, was substituted as plaintiff in his stead.

For some twenty years prior to August 16, 1913, Hansen had been suffering from pulmonary tuberculosis, so that the disease had become chronic. From time to time he had been under the care of various regular physicians at Deer Lodge, near which place he resided on a farm, and of specialists who resided in St. Louis and Kansas City, Missouri, to whom he had gone hoping to be cured. These had all pursued substantially the same course of treatment, prescribing creosote and cod liver oil in varying proportions, but none of them held out to Hansen hope of complete recovery, advising him that their treatment would serve only to check the progress of the disease and perhaps prolong his life. In 1910 he was under the care of Dr. Dye, of Deer Lodge, but concluding that he was not being benefited by Dr. Dye's treatment, he ceased to employ him and was not thereafter under the care of any physician until August 16, 1913, when he employed the defendant. Gradually he had grown weaker from the ravages of the disease, until he had ceased active work on his farm. He had at times expectorated some blood, but had not suffered from hemorrhage until August 15, when he had one of some violence. He was much discouraged by this and determined to consult the defendant. He was induced to do this by having his attention accidentally called to the following advertisement, published in the "Butte Evening News," of that date:

"Dr. Huie Pock. Professional services to the public, and a guaranty of a sure cure for all kinds of diseases, including chronic cases of long standing. Also all complaints and weaknesses entirely cured. No. 227, S. Main St., Ind. Phone. 5152."

On August 16 he went to Butte in company with his wife, and to defendant's place of business, where the latter conducted a store as well as gave treatment to those who went there for

that purpose. The defendant examined him superficially by feeling his pulse and inspecting his tongue, though Hansen gave him a history of his case, telling him that he had suffered from hemorrhages due to tuberculosis. The defendant made no examination of his lungs nor did he test his sputum or urine, informing him that his trouble was not tuberculosis but a disease of the kidneys, which he could cure. Hansen thereupon put himself under defendant's care for treatment. He thereafter took the medicine prescribed by the defendant, prepared from herbs which defendant stated had been brought from China. He was required to visit defendant's place, first, every third day, then every fourth, and finally every tenth day. These visits continued until March 6, 1914, when Hansen, realizing that, though he had not thereafter suffered from hemorrhage, his condition was not being improved, but that, on the contrary, he was growing weaker, ceased to visit the defendant and to take the medicine furnished by him.

The complaint charges: That defendant, having entered upon the employment, "did not use due and proper care or skill in endeavoring to cure plaintiff from the said disease or malady, to-wit, tuberculosis or consumption, in this: that, whereas, the plaintiff was then and there suffering with what is commonly known and designated by physicians as a chronic disease or malady of tuberculosis or consumption, the defendant treated the plaintiff for a kidney disease or disorder, and continuously so treated the plaintiff for said kidney disease or disorder from the sixteenth day of August, 1913, to on or about the sixth day of March, 1914, inclusive; that except as a result of tuberculosis or consumption, the plaintiff was not at any of the time above mentioned suffering with any * * * disease or disorder; that * * * through lack of care and attention to the disease or malady with which plaintiff was then suffering, this plaintiff well-nigh died, and the ravages of consumption or tuberculosis, having gone on unchecked in plaintiff's body, made the plaintiff so weak that he was unable to stand or walk without assistance."

The defendant in his answer admitted that he had been employed by plaintiff; that he had informed him that he was affected by a disease of the kidneys; and that he could cure him provided he would follow defendant's prescribed course of treatment for a sufficient length of time. He admitted that he had treated plaintiff during the time alleged, but denied that he had been guilty of negligence or that he had failed to use proper care and skill in doing so. As an affirmative defense he alleged, in substance, that for more than thirty years he had been skilled in the practice of medicine and the use of herb compounds; that his knowledge had been gained by many years' study in the schools of medicine established according to the customs and laws of China, and from his practice; that he had never professed to practice medicine as known to any other race of people, except so far as the practice pursued by him was common to Chinese methods and those of established schools of other races; that plaintiff consulted him with actual knowledge that he was a Chinese physician and solicited his services and skill as such, and not otherwise; that plaintiff entered into a verbal contract with him for treatment for a kidney disease of long standing, agreeing that he (plaintiff) would submit to the treatment and faithfully use the compounds prescribed by defendant, for a period of time sufficient to enable defendant to effect a cure; that on or about March 16, 1914, plaintiff voluntarily, and without notice to defendant, abandoned the contract and through his own fault thereafter ceased to receive the benefit of defendant's treatment; that the disease was of a wasting nature, and, being of long standing, required treatment for a much longer time than that which defendant had been permitted to treat it, and that, if plaintiff had been injured in his health or had suffered from the ravages of tuberculosis, such result was caused by his own fault in failing to follow the course prescribed by defendant.

In his reply, plaintiff admitted that he solicited the services of the defendant, with knowledge that he was a Chinese physician; that he entered into a contract with him for his services

in that capacity, and accepted his treatment until he voluntarily ceased to visit him and to use the compounds prescribed by him. The other allegations he put in issue by general denial.

The principal contention made by counsel is that the evidence does not justify the verdict. They contend that testimony of physicians of recognized American schools, introduced by plaintiff, that defendant's diagnosis and treatment could not be justified from any point of view, was not sufficient to convict him of a lack of ordinary care and skill, and that if this be conceded, the evidence otherwise fails to show that plaintiff was injured. This contention must be overruled. The evidence is voluminous. It will not be necessary to set it forth and subject it to a critical analysis, however, for the reason that the salient facts are not seriously controverted. It will suffice for present purposes to state generally the inferences which it warrants and determine whether, under the rules of law applicable, the contention of counsel is maintainable.

It is admitted by the pleadings that the plaintiff employed the defendant as a Chinese physician. Defendant alleged that the plaintiff was at that time suffering from a kidney disease, and thus tendered an issue upon the question whether he was suffering from chronic tuberculosis; but it is not seriously controverted in the evidence that plaintiff was suffering from this disease nor was there any evidence, other than that of defendant, that he was affected with any other disease. There is no controversy but that after the superficial examination described above, the defendant directed the plaintiff to discard entirely the use of eggs, chicken and milk as food, which had theretofore been his diet, and also to refrain from drinking cold water; that he prescribed a concoction of herbs which he said had been brought from China, requiring plaintiff to take it daily and to visit him as above stated; that the plaintiff remained under his treatment for seven months; that as a result he lost flesh, until his weight had decreased twenty-five pounds; that he gradually grew weaker, until he walked with difficulty and was confined

to the house; that the cough which accompanied the disease grew more harassing; that after he abandoned the treatment, he put himself under the care of Doctors Crabb and Willard, at Deer Lodge; that upon examination they found him suffering from no disease other than tuberculosis, and, in addition to the usual remedies resorted to to check the disease, they prescribed life in the open air and plenty of wholesome food, including milk and eggs; that he thereupon began to gain flesh and to increase in strength and weight, a condition which continued until the time of the trial; that there is no such school recognized as a Chinese or "generation" school, such as that to which plaintiff claimed to belong, so-called because defendant had "inherited the right to practice from his grandfather," having established rules and regulations; that the concoction of herbs administered by him had only a cathartic effect and was destitute of any curative virtue whatever for tuberculosis or any tendency to retard its progress, but, on the contrary, aided the disease by permitting its ravages to go unchecked; and that this mode of treatment naturally resulted in injury to the plaintiff. Though the defendant testified that he had had long preparation by study in China and experience by extensive practice in treating tuberculosis, his testimony failed to disclose any established rules or methods of practice which he observed and which guided him in diagnosing diseases or in treating them. On the contrary, his testimony disclosed that he was profoundly ignorant of the circulation of the blood or the relations of the various organs of the body or their several functions or where the pulse is situated. It showed conclusively that he was simply a charlatan, without skill or scientific knowledge, who made it his business to practice upon the ignorant and unwary for gain.

It is the rule, recognized by the courts generally, that when one holds himself out as a physician or surgeon, whether licensed or not, and accepts employment as such to treat a patient, he assumes toward the patient the obligation to exercise such rea-

sonable care and skill in that behalf as is usually exercised by physicians or surgeons of good standing, of the same system or school of practice in the community in which he resides, having due regard to the condition of medical or surgical science at that time. (*Pike* v. *Honsinger*, 155 N. Y. 201, 63 Am. St. Rep. 655, 49 N. E. 760; *Nelson* v. *Harrington*, 72 Wis. 591, 7 Am. St. Rep. 900, 1 L. R. A. 719, 40 N. W. 228; *Longan* v. *Weltmer*, 180 Mo. 322, 323, 103 Am. St. Rep. 573, 64 L. R. A. 969, 79 S. W. 655; *Force* v. *Gregory*, 63 Conn. 167, 38 Am. St. Rep. 371, 22 L. R. A. 343, 27 Atl. 1116; *Small* v. *Howard*, 128 Mass. 131, 35 Am. Rep. 363.) "This rule is elementary and has its foundation in most persuasive considerations of public policy. Its purpose is to protect the health and lives of the public, particularly of the weak and credulous, the ignorant or unwary, from the unskillfulness or negligence of medical practitioners, by holding such practitioners liable to respond in damages for the results of their unskillfulness or negligence. Moreover, it is a rule which the law has evolved out of the relation of physician and patient, rather than out of any particular contract, either specific or implied, in fact or in law. That relation is the result of a consensual transaction that need not be a contract, and its existence is a question of fact. On the relation of physician and patient there is predicated by the law the duty of the physician to exercise the requisite skill and care, and such duty is affected not at all by the fact that the service rendered is gratuitous, or by the fact that the physician was employed by a third person, so that no contractual relation existed between him and the patient." (21 R. C. L., p. 379.)

The rule was recognized by this court, though not stated as fully as above, in the case of *Stevenson* v. *Gelsthorpe*, 10 Mont. 563, 27 Pac. 404. It will be observed that under it the liability of a physician or surgeon in any particular case is to be determined by an answer to the inquiry whether he has pursued the rules and regulations of the system or school to which he belongs. The law, however, is not concerned so much about the

school to which he claims to belong, nor where he gained the qualifications necessary to enable him to practice. It is concerned about the fidelity with which he has met his obligations, and whether he has acquitted himself in the treatment of the particular patient, according to the measure of the standard of those of recognized schools who practice in the same or similar communities.

In the case of *Nelson* v. *Harrington, supra,* the court was called on to decide the question whether one who holds himself out as a clairvoyant physician, there being no recognized school designated as a clairvoyant school, having fixed principles or formulated rules for the treatment of diseases, should be held to the standard which is applicable to ordinary physicians. On this subject the court said: "To constitute a school of medicine, under this rule, it must have rules and principles for the guidance of all its members, as respects principles, diagnosis and remedies, which each member is supposed to observe in any given case. Thus, any competent practitioner of any given school would treat a given case substantially the same as any other competent practitioner of the same school would treat it. One school may believe in the potency of drugs and bloodletting, and another may believe in the principle *similia similibus curantur;* still others may believe in the potency of water, or of roots and herbs; yet each school has its own peculiar principles and rules for the government of its practitioners in the treatment of diseases. Not so, however, with clairvoyant practice. True, the practice has but one mode of ascertaining what the disease is and the remedy therefor. This mode has already been stated. But the mode in which a physician acquires a knowledge of his profession has nothing to do with his school or system of practice. One person may acquire such knowledge from certain books; another from certain other books, which perhaps teach different principles; still another from oral communications, as lectures, *etc.,* or from experience alone; and still another from his intuitions when in an abnormal mental

state; yet these differences do not necessarily constitute separate schools of medicine. The clairvoyant and the practitioners of the allopathic or homeopathic system may belong to the same school or system, provided they adopt the same principles and observe the same rules of treatment. The methods by which a man acquires a knowledge of medical science is one thing, and the principles and rules which govern him in practice of medicine is another and very different thing. This is just the difference between clairvoyant physicians as a class, and the practitioners of a school or system of medical practice recognized in the general rule of professional ability above laid down." The court concluded that, there being no recognized school of clairvoyant medicine, the defendant was properly held liable by the trial court, on the ground that, having held himself out as other physicians, he had not met the requirements of the rule of law applicable to them. So the supreme court of Missouri, in *Longan* v. *Weltmer, supra,* held that a magnetic healer was liable to a patient to whom the defendant administered treatment which, in the opinion of ordinary physicians, could not be justified by the rules of recognized schools, though they knew nothing of the principles of magnetic healing.

In the case of *Musser's Exr.* v. *Chase,* 29 Ohio, 577, the supreme court of Ohio held that a farmer who held himself out as a cancer doctor having skill and experience in the treatment and cure of cancer, came within the rule which "requires the exercise of such skill and care as are usually possessed and employed by the general physician in the treatment of such maladies."

Counsel cite the case of *Spead* v. *Tomlinson,* 73 N. H. 46, 68 L. R. A. 432, 59 Atl. 376, as conclusive of their contention. In that case the facts were that the plaintiff, through her interest in the doctrines of Christian Science and the cures which defendant professed to be able to perfect through the agency of prayer, was induced to employ him to cure her of an attack of appendicitis. He undertook the cure for a reward, but, the

malady growing worse, the plaintiff placed herself under the charge of a surgeon, submitted to an operation and was cured. She then brought action against the defendant for damages for malpractice. The trial court directed a verdict for the defendant. On appeal the supreme court affirmed this action, on the ground that there was no evidence showing negligence by the defendant in his treatment under the Christian Science practice, and that one who holds himself out as a Christian Science healer and is employed to give treatment by the methods adopted by such practitioners is required to possess only the knowledge and exercise the care and skill of the ordinary Christian Scientist. The court said: "What the parties mutually expected was that the defendant would treat the plaintiff according to Christian Science methods; and it necessarily follows that the defendant in the treatment of the plaintiff is to be judged by the standard of care, skill and knowledge of the ordinary Christian Scientist in so far as he confined himself to these methods." That case has no application to the facts of this case for the reason that the defendant, as shown by his advertisement, professed to be able to cure any kind of chronic disease, while the plaintiff knew nothing of his skill or knowledge, nor did he know anything of his methods. All he knew, so far as the evidence discloses, was that defendant was a Chinese physician who professed to be able to cure his malady.

The evidence tending to show that the plaintiff was injured and the amount of damages he is entitled to recover is not very satisfactory; it does furnish a basis, however, for the inference that he suffered some injury. In our opinion, the amount of the verdict—$2,500—is excessive; but as no complaint is made of it on this ground, we do not think we should disturb it.

It is contended that the court erred in refusing to submit instruction referred to as 15B, requested by the defendant. It is not pointed out by counsel in what respect there was error in refusing this instruction, nor wherein defendant suffered prejudice. Upon examination of the charge as a whole, we

think it fully covered every phase of the case and was as fair to the defendant as he was entitled to demand.

The judgment and order are affirmed.

Affirmed.

ASSOCIATE JUSTICES HOLLOWAY, HURLY, MATTHEWS and COOPER concur.

Rehearing denied January 26, 1920.

JONOSKY, ADMR., RESPONDENT, *v.* NORTHERN PACIFIC RY. CO., APPELLANT.

(No. 4,066.)

(Submitted December 12, 1919. Decided January 2, 1920.)

[187 Pac. 1014.]

Railroads—Trespassers—Action for Death—Negligence—Licensees—Common Law.

Personal Injuries—Actionable Negligence.

1. Actionable negligence arises only from breach of legal duty.

Same—Railroads—Duty Owing to Trespassers.

2. The only duty owing by a railway company to a trespasser upon its tracks is to refrain from wantonly or willfully injuring him after discovering his presence in a position of peril.

Same—Implied Invitation—Implied License—Definition.

3. An invitation is inferred where there is a common interest or mutual advantage; a license is implied where the object is the mere pleasure, convenience or benefit of the person enjoying the privilege.

Same—Railroads—Duty Owing to Licensee.

4. Under the above rule (par. 3), decedent, who was fatally injured while attempting to crawl under the coupling between two cars of a freight train standing in defendant company's yards, rather than take a more circuitous route and cross at a street crossing, was a bare licensee, to whom defendant owed no duty other than that of not knowingly and willfully causing him harm.

Same—Duty Owing to Licensee—Common-law Rule.

5. Under the common law adopted in this state, in the absence of legislative declaration to the contrary, the owner of premises owes to a licensee no duty as to their condition, save that of not knowingly exposing him to hidden perils or wantonly and willfully causing him harm; the licensee enjoying the license subject to the concomitant perils arising from the owner's use in the ordinary course of business.

Common Law—Rule of Decision in State.

6. The common law of England, so far as not repugnant to or inconsistent with the federal or state Constitution or the laws of this state, is the rule of decision in all the courts of the state.

Appeal from District Court of Silver Bow County; J. J. Lynch, Judge.

ACTION by Joseph Jonosky, as administrator of the estate of Chester Jonosky, deceased, against the Northern Pacific Railway Company. Judgment for plaintiff. Defendant appeals. Reversed, with directions to dismiss the action.

Messrs. Walker & Walker and *Messrs. Gunn, Rasch & Hall,* for Appellant, submitted a brief; *Mr. E. M. Hall* argued the cause orally.

At common law the rule is that railroad companies owe no duty to trespassers or mere licensees other than to refrain from willful or wanton injury to them and to use reasonable care to prevent injury after discovering them in danger, even though such trespassers or licensees have been using the company's premises or tracks for a long time without objection or protest. (Elliott on Railroad, secs. 1250–1252.) No statute has ever been enacted in this state modifying this rule of the common law. In fact, the common-law rule has been so frequently announced and followed in this state that it is the settled law here regardless of how other jurisdictions may have modified it by statute or court decisions. *Egan* v. *Montana Central Ry. Co.,* 24 Mont. 569, 63 Pac. 831, is the leading case in this state. There is no distinction between that case and the case at bar. The *Egan Case* has been repeatedly cited and followed in later decisions of this court and in no case has the doctrine there announced been overruled. (See *Beinhorn* v. *Griswold,* 27 Mont. 79, 91, 94 Am. St. Rep. 818, 59 L. R. A. 771, 69 Pac. 557; *Driscoll* v. *Clark,* 32 Mont. 172, 185, 80 Pac. 1, 373; *Montague* v. *Hanson,* 38 Mont. 376, 382, 99 Pac. 1063; *Conway* v. *Monidah Trust,* 47 Mont. 269, 277, L. R. A. 1915E, 500, 132 Pac. 26; *Dalmer* v. *Northern Pac. Ry. Co.,* 48 Mont. 152, 162,

136 Pac. 1059, 142 Pac. 209; *McLaughlin* v. *Bardsen*, 50 Mont. 177, 189, 145 Pac. 954; *Fusselman* v. *Yellowstone Valley L. & I. Co.*, 53 Mont. 254, Ann. Cas. 1918B, 420, 163 Pac. 473.) From the foregoing cases the rule appears to be settled that the duty a railway company owes to a mere licensee on its premises without invitation express or implied is no different than the duty it owes to a trespasser. A railroad company is no more required to warn or look out for infant than for adult trespassers. (4 Ann. Cas. 680 and note; 16 Ann. Cas. 247 and note.)

In other states the rule announced in the Egan and other Montana cases has been repeatedly applied, and this is particularly so in cases where the injuries were received in railway switch-yards containing a large number of tracks and under circumstances similar to those in this case. (*Central R. R. & Banking Co.* v. *Rylee*, 87 Ga. 491, 13 L. R. A. 634, 13 S. E. 584; *Georgia R. & B. Co.* v. *Fuller*, 6 Ga. App. 454, 65 S. E. 313; *Malott* v. *Union Pac. Ry. Co.*, 99 Kan. 115, 160 Pac. 978; *Barney* v. *Hannibal etc. Ry. Co.*, 126 Mo. 372, 26 L. R. A. 847, 28 S. W. 1069; *Scharf* v. *Spokane etc. R. Co.*, 92 Wash. 561, 159 Pac. 797; *McCoy's Admr.* v. *Williamson & P. C. R. Co.*, 174 Ky. 186, 192 S. W. 45; *Masser* v. *Chicago, R. I. & P. Ry. Co.*, 68 Iowa, 602, 27 N. W. 776; *Anternoitz* v. *New York etc. Ry. Co.*, 193 Mass. 542, 79 N. E. 789; *Catlett* v. *St. Louis etc. Ry. Co.*, 57 Ark. 461, 38 Am. St. Rep. 254, 21 S. W. 1062; *Katzinski* v. *Grand Trunk Ry. Co.*, 141 Mich. 75, 104 N. W. 409; *Atchison etc. Ry. Co.* v. *Plaskett*, 47 Kan. 107, 112, 26 Pac. 401; *Thomas* v. *Denver etc. Ry. Co.*, 60 Colo. 302, 153 Pac. 440; *Union Stockyard etc. Co.* v. *Butler*, 92 Ill. App. 166, 172; *Smalley* v. *Rio Grande W. Ry. Co.*, 34 Utah, 423, 98 Pac. 311; *Wright* v. *Boston & A. R. Co.*, 142 Mass. 296, 7 N. E. 866.)

We appreciate the fact that there are a number of cases holding that where the public for years has been accustomed to cross the tracks of a railway company upon a well-defined path with the acquiescence of the company, although without its express license or consent, a license to do so would be presumed and the company required to take reasonable precautions to avoid in-

juring persons so using the track. In most of such cases the facts show active acquiescence, or some affirmative act or conduct upon the part of the company amounting to an implied invitation. In a number of these cases the facts show reckless conduct or gross negligence on the part of the company, bringing them under the rule announced in *McLaughlin* v. *Bardsen*, 50 Mont. 177, while a few of the cases are to the effect that a mere tacit or negative permission by a railway company for people to cross its tracks amounts to a license for them so to do and imposes a duty to keep a lookout for them. These latter cases are directly in conflict with the law of this state as announced in the Egan and other cases cited above and contrary to the weight of authority.

Contributory negligence: If the boy was capable of appreciating the danger into which he was entering, and if the evidence shows that he voluntarily crawled over or between the cars when he could have passed safely through an open space only a few feet west, then there can be no recovery. (*Wolfe* v. *Peirce*, 24 Ind. App. 680, 57 N. E. 555; *Martin* v. *Northern Pac. Ry. Co.*, 51 Mont. 31, 149 Pac. 89.) As to whether a child is capable of contributory negligence, as a matter of law, depends largely upon the facts in each case. (*Mason* v. *Northern Pac. Ry. Co.*, 45 Mont. 474, 124 Pac. 271.)

Messrs. Harry and *William Meyer*, for Respondent, submitted a brief; *Mr. Harry Meyer* argued the cause orally.

Counsel for appellant rely to a large extent upon the decision of this court in the case of *Egan* v. *Montana Central Ry. Co.*, 24 Mont. 569, 63 Pac. 831, and contend that it is decisive of the case at bar, and further, that the *Egan Case* cannot be distinguished from this case. We contend (1): That the two cases are clearly distinguishable, and (2) That the *Egan Case* is not sound law, has been criticised by this court in different decisions, and is in conflict with the weight of authority—the better reasoned and more recent cases—and is contrary and opposed to the doctrine of humanity which has, of late years, played so

large and important a part in the consideration of this class of cases. We also contend that this court in many of its decisions, which we shall hereafter cite, has, if not expressly, at least impliedly, disapproved of the doctrine laid down in the *Egan Case*, and that in at least one opinion one of the judges of this court expressly stated that he disagreed with the doctrine in the *Egan Case*. We refer to the case of *Neary* v. *Northern Pacific Ry. Co.*, 41 Mont. 480, 110 Pac. 226. In order to successfully contend that a case has been followed, we maintain that the facts in the subsequent case must be similar to the facts in the case claimed to have been followed. None of the Montana cases cited was decided on a statement of facts, even remotely similar to the facts in the *Egan Case*.

This court has never yet been called upon to decide a case in which the facts were similar or nearly similar to the facts in the case at bar. This statement is prompted by the fact that, in our opinion, this court has intimated upon more than one occasion that should a case in which the facts were similar to the facts in the case at bar ever be presented to it, the rule for which we are here contending would undoubtedly be approved by this court. We believe this statement justified by the decisions of this court and which we shall hereafter call to the court's attention.

If we understand the decision in *Nixon* v. *Montana etc. Ry. Co.*, 50 Mont. 95, Ann. Cas. 1916B, 299, 145 Pac. 8, correctly, it recognizes the doctrine of implied invitation, and that an implied invitation may be authorized by custom, it further recognizes the rule that, where a railroad company permits people to use its track as a highway by implied invitation, it must take note of such use and operate its instrumentalities accordingly. No decision by this court has ever modified this rule. (See, also, *Montague* v. *Hanson*, 38 Mont. 376, 99 Pac. 1063; *McLaughlin* v. *Bardsen*, 50 Mont. 177, 145 Pac. 954; *Gates* v. *Northern Pac. Ry. Co.*, 37 Mont. 103, 94 Pac. 751; *Fusselman* v. *Yellowstone V. L. & I. Co.*, 53 Mont. 254, Ann. Cas. 1918B, 420, 163 Pac. 473.)

We shall now call the court's attention to the cases from other jurisdictions sustaining the rule for which we are here contending. We first call attention to the case of *St. Louis & S. F. R. Co.* v. *Hodge* (Okl.), 157 Pac. 60, 63. This case is almost on all-fours with the case at bar, and because the facts are so nearly similar to the facts in the case at bar and because it is such a well-considered case, we cannot too strongly urge the court to read this opinion. It considers every point urged by the appellant, in this case, and upholds every contention made by us herein, citing a large number of cases from various jurisdictions in support of its conclusion.

The case of *Tutt* v. *Illinois Central Ry. Co.*, 104 Fed. 741, 44 C. C. A. 320, is a case very similar to the case at bar. It was there held to be a question of fact for the jury whether plaintiff was upon the property of the railroad company under an implied license which imposed upon it the duty of exercising care to discover his presence and to avoid injury to him. This case is particularly pertinent here, because, as in this case, the railroad company introduced evidence that it had instructed its employees to keep persons away from its tracks and that children had several times been driven away. To the same effect see *Northern Pac. R. R. Co.* v. *Curtz*, 196 Fed. 367, 116 C. C. A. 403. Another case almost on all-fours with the case at bar is the case of *O'Leary* v. *Pittsburgh etc. R. Co.*, 248 Pa. St. 4, 93 Atl. 771. To the same effect see the following cases: *New York, N. H. & H. R. Co.* v. *Kmetz*, 193 Fed. 603, 113 C. C. A. 471; *Swift* v. *Staten Island R. T. R. Co.*, 123 N. Y. 645, 25 N. E. 378, 379; *Lodge* v. *Pittsburgh & L. E. R. Co.*, 243 Pa. St. 10, 89 Atl. 790; *Doyle* v. *Portland Ry., L. & P. Co.*, 71 Or. 576, 143 Pac. 623; *Troy* v. *Cape Fear etc. R. Co.*, 99 N. C. 298, 6 Am. St. Rep. 521, 6 S. E. 77; *Davis* v. *Chicago & N. W. R. Co.*, 58 Wis. 646, 46 Am. Rep. 667, 17 N. W. 406; *Frye* v. *St. Louis, I. M. & S. R. Co.*, 200 Mo. 377, 8 L. R. A. (n. s.) 1069, 1076, 98 S. W. 566; *Morgan* v. *Wabash R. Co.*, 159 Mo. 262, 60 S. W. 195; *Wilhelm* v. *Missouri O. & G. Ry. Co.*, 52 Okl. 317, L. R. A. 1916C, 1029, 152 Pac. 1088; *Great Northern Ry. Co.* v. *Thompson*, 199 Fed.

395, 47 L. R. A. (n. s.) 506, 118 C. C. A. 79; *Anderson* v. *Great Northern Ry. Co.*, 15 Idaho, 513, 99 Pac. 91.

Under *Mason* v. *Northern Pacific Ry. Co.*, 45 Mont. 474, 124 Pac. 271, and *Conway* v. *Monidah Trust*, 47 Mont. 269, L. R. A. 1915E, 500, 132 Pac. 26, the question of contributory negligence was properly left to the jury. Counsel, however, have seen fit to cite and quote from the decisions of other states to show that the question was one of law for the court to decide, and while we do not believe it to be an open question in this state, we take the liberty of calling the court's attention to the following cases, wherein it was held, in accordance with the rule in the *Mason Case*, that this question was properly for the jury, and in some of these cases the children injured or killed were much older than Chester Jonosky. (*Northern Pacific R. Co.* v. *Chervenak*, 203 Fed. 884, 122 C. C. A. 178; *Texas & N. O. R. Co.* v. *McLeod*, 62 Tex. Civ. 270, 131 S. W. 311; *Trent* v. *Norfolk & W. R. Co.*, 167 Ky. 319, 180 S. W. 792; *Gulf, C. & S. F. Ry. Co.* v. *Garrett* (Tex. Civ.), 99 S. W. 162; *Gesas* v. *Oregon S. L. R. Co.*, 33 Utah, 156, 13 L. R. A. (n. s.) 1074, 93 Pac. 274; *Cahill* v. *E. B. & A. L. Stone & Co.*, 153 Cal. 571, 19 L. R. A. (n. s.) 1094, 96 Pac. 84; *Hammond W. & E. C. etc. R. Co.* v. *Blockie*, 40 Ind. App. 497, 82 N. E. 541; *Denver City Tramway Co.* v. *Nicholas*, 35 Colo. 462, 84 Pac. 813; *St. Louis & S. F. R. Co.* v. *Hodge* (Okl.), 157 Pac. 60, 69; *Lodge* v. *Pittsburgh & L. E. R. Co.*, 243 Pa. St. 10, 89 Atl. 790; 1 Thompson on Negligence, section 310.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Immediately east, south and west of its passenger station in Butte are the yards owned and operated by the Northern Pacific Railway Company. Through these yards, running from east to west, are the main-line tracks and some twenty or more tracks parallel thereto, with the necessary connecting switches. These tracks are in constant use in moving trains through the yards, in storing cars, in making up and breaking up trains, in mov-

ing cars to and from warehouses and to and from loading and unloading spurs. Several city streets, including California Avenue, extend from the north to, and terminate at, the north line of the yards. Some distance south of the yards there is a considerable number of houses occupied by people not connected with the business of the railway company. These houses are within the city limits and occupy regularly laid out lots and blocks, the blocks being separated by streets, running north and south, which bear the same names as the streets north of the yards. On Harrison Avenue, at the east end of the yards, there is a public street crossing, and at the west end, on Kaw Avenue, there is another. Between these two streets, a distance of approximately 200 rods, there is no public highway, street or other thoroughfare across these yards.

On the afternoon of April 19, 1916, about thirty freight cars, all coupled together, were standing on track 11 in the yards. The two cars farthermost to the west were immediately west of the west line of California Avenue extended to the south, the east end of the string of cars being about 1,100 feet farther east. In the course of business it became necessary for the railway employees to remove the twelfth car from the east end of the string of cars, and to effect this purpose a locomotive backed on to the east end of track 11 and against the easternmost car of the string with sufficient force to cause the coupling to be made automatically, and this force drove all the cars to the west three or four feet. Just at the instant of the impact, Chester Jonosky, a minor, was crawling under the coupling between the second car and third car from the west end of the string of cars. The car-wheel of the third car passed over his left leg and injured his right leg. As the result of these injuries, the boy died a few hours later, and this action by the administrator of his estate was brought to recover damages.

It is alleged that for more than a year prior to the accident, children as well as adults were permitted by the railway company to cross and recross the tracks, particularly at a point where California Avenue on the north, if extended, would con-

nect with California Avenue south of the yards; that the custom of the people was known to the railway company and acquiesced in without objection, and by reason thereof, the duty was imposed upon the company to exercise reasonable care to keep a lookout for children who might be crossing the yards, and to give appropriate warning of its intended movements of cars; that it failed in both respects, and that the death of the boy was caused proximately by the failure of the railway company to discharge this duty. The answer is substantially a general denial.

Witnesses in behalf of the plaintiff testified that for a considerable period prior to the injury the people living south of the tracks had habitually traveled back and forth across the yards as a short-cut to, or convenient means of reaching, points north of the yards and to avoid the longer route by way of the public crossings; that this custom was known to the railway company and suffered to prevail without objection, so far as the witnesses knew, and one witness, a school girl, testified that on two or three occasions employees of the company had assisted her in getting between coupled cars standing in the yards.

There is not a suggestion in the evidence that a walk had been constructed across the tracks; that the travel had followed any well-defined route over the tracks; that the yards could be used by these people without materially interfering with their proper use by the company, or that the company had in any manner held out to these people or induced them to believe that the yards could be crossed in safety, or that it was intended to permit the use of any portion of the yards, or the yards in their entirety, as a public crossing, but, on the contrary, the employees of the company working in the yards testified in effect that every reasonable effort had been expended to prevent the use of the yards by these people and particularly by children; that appeals had been made to the police department and to the school authorities to assist in keeping children out of the yards, and in this they were corroborated by the chief of police and the truant officer.

Upon the trial, and over defendant's objection, the court instructed the jury that, as to licensees, the railway company owed the duty to exercise reasonable care in the management and running of its trains to protect them from injury and refused defendant's offered instruction to the effect that, as to licensees, the company was under no duty to keep a lookout or give warning of the intended movement of cars in the yards. The trial resulted in a verdict for the plaintiff, and from the judgment entered thereon, this appeal is prosecuted.

Counsel for appellant contend that the boy was a trespasser, or, at best, a licensee. Counsel for respondent insist that he was a licensee, and for the purpose of this appeal he will be treated as such. The two instructions above, then, fairly present the conflicting views of the respective parties upon the law governing this case.

The action is grounded in the alleged primary negligence of the railway company, and does not involve any element of the last clear chance doctrine, or the doctrine of attractive nuisances.

Actionable negligence arises only from a breach of legal duty [1] (*Fusselman* v. *Yellowstone Valley L. & I. Co.*, 53 Mont. 254, Ann. Cas. 1918B, 420, 163 Pac. 473), and therefore, to determine the correctness of the theory upon which this case was submitted, it is necessary to determine just what legal duty the company owed to Chester Jonosky at the time he was injured. If it owed him the primary duty to keep a lookout and give warning of the intended movement of cars in the yards, then this judgment should be affirmed; if it did not, plaintiff has no cause of action.

Decided cases almost without number may be found which assume to define the legal relationship existing between a railway company and a person injured on its tracks. These cases cover every gradation of the relationship from that existing between the company and its employee rightfully in the position, in the discharge of his duties, to that existing between the company and a naked trespasser on the tracks without the semblance of

right. In a few jurisdictions no distinction is drawn between the measure of duty owed by the company to its employee, on the one hand, and the trespasser, on the other; but these cases are exceptional. In Arkansas and Tennessee, and possibly in other states, this rule is established by statute. With the excep-
[2] tions noted, it may be said that the rule is universal that as to a trespasser the company owes no primary duty. Its duty is of a negative character: to refrain from wantonly or willfully injuring him after discovering his presence in a position of peril. Passing to a consideration of the duty owed to a
[3] licensee, however, we enter a veritable maze of conflicting and contradictory decisions. Much of the confusion arises from the failure of the courts to distinguish between a license and an invitation, and particularly between an implied license and an implied invitation. The distinction is not merely one of descriptive phraseology, but has its foundation in sound common sense. An invitation is inferred where there is a common interest or mutual advantage, while a license is implied where the object is the mere pleasure, convenience or benefit of the person enjoying the privilege. (*Bennett* v. *Louisville etc. R. R. Co.*, 102 U. S. 577, 584, 26 L. Ed. 235 [see, also, Rose's U. S. Notes]; 2 White on Personal Injuries on Railroads, sec. 870.) The supreme court of Massachusetts has stated the rule as follows: "To come under an implied invitation as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged or which he permits to be carried on there. There must, at least, be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant." (*Plummer* v. *Dill*, 156 Mass. 426, 32 Am. St. Rep. 463, 31 N. E. 128; *Wright* v. *Boston & A. R. R.*, 142 Mass. 296, 300, 7 N. E. 866; Elliott on Railroads, sec. 1249; 1 Thompson on Negligence, sec. 987; 17 R. C. L. 566; 29 Cyc. 455.) The same distinction is made by the English courts. (*Holmes* v. *Northeastern Ry. Co.*, L. R. 4 Exch. 254.)

At the time he was injured, Chester Jonosky was not engaged [4] in any business in which the railway company was interested. He was crossing the tracks as a mere matter of convenience to himself, to save the effort of traveling the more circuitous route and crossing at the public street. At best, he was a bare licensee enjoying the gratuitous favor of the company in the use of its property. What, then, was the measure of the company's duty toward him?

At common law the rule was well settled. The owner of [5] premises owed to the licensee no duty as to the condition of the premises, save that he should not knowingly expose him to hidden perils or wantonly and willfully cause him harm. The licensee entered upon the premises at his own risk and enjoyed the license subject to the concomitant perils arising from the owner's use in the ordinary course of business. (Pollock on Torts, 10th ed., 544; 2 White on Personal Injuries on Railroads, sec. 860; *Burchell* v. *Hickisson*, 50 L. J. C. P. 101; *Hounsell* v. *Smyth*, 2 L. T. Rep. (n. s.) 440; *Bolch* v. *Smith*, 7 H. & N. 736; *Phillips* v. *Library Co.*, 55 N. J. L. 307, 27 Atl. 478; *Devoe* v. *New York, O. & W. Ry. Co.*, 63 N. J. L. 276, 43 Atl. 899; *Sweeny* v. *Old Colony & N. Ry. Co.*, 10 Allen (Mass.), 368, 87 Am. Dec. 644; *Romana* v. *Boston Elev. Ry. Co.*, 218 Mass. 76, Ann. Cas. 1917A, 893, 105 N. E. 598.) Thompson in his Commentaries on the Law of Negligence says: "A fair expression of the doctrine is that a railway company is under no obligation to protect a person on the track under an implied license to use its right of way, by taking steps to prevent harm to such person, unless it has so acted as to mislead him; but that the extent of its duty is not to injure him wantonly or willfully; and that one who enters the yard of a railway company under a mere license, assumes the risk of all dangers which are caused by a natural and proper use of the tracks and trains." (Sec. 1722.)

As opposed to the common-law rule is the so-called intermediate rule, adopted by a considerable number of American courts, substantially to this effect: "Where the track or the grounds of a railway are used by pedestrians as a passageway, for a con-

siderable time without objection, or with a tacit acquiescence on the part of the company, a pedestrian crossing over such grounds or along such tracks becomes a licensee in such a sense that he is not to be considered a mere trespasser acting at his peril, to whom the company owes no special duty until his peril is discovered, but that it becomes the duty of the company, in operating its road at such a place, to use increased prudence and caution in proportion to the danger to such persons, by maintaining a lookout upon its engines and trains, and, according to a considerable mass of authority, by giving *audible signals* on approaching such places, such as would be reasonably required on approaching a public crossing." Thompson says this doctrine is "difficult to defend upon sound principle." (2 Thompson on Negligence, par. 1724, p. 426.) Concerning it, Elliott says: "This rule seems to us to be not only contrary to the weight of authority, but also impracticable and in violation of the true principle that should govern such cases. If it be true, as generally conceded, that a licensee takes his license subject to the 'concomitant risks and perils,' he must surely take it subject to the use of the road in the manner in which it was used at the time the license was granted, that is, subject to the running of trains in the ordinary manner without any special reference to him, and he occupies, therefore, to this extent, substantially the position of a trespasser. In other words, the company owes him no duty of active vigilance to specially look out for and protect him, for he must know that his license is subject to all risks incident to the use of the track by the company in the same manner in which it was used at the time the license was granted, and that the company assumes no new obligation or duty. Indeed, it seems to us that he is bound to know that a railroad company has no power to license the use of its tracks in such a manner as to interfere with its duties to the public as a common carrier. If it owes a duty to every bare licensee to run its trains with reference to him, to look out for him, to signal, to slow up, and, perhaps to stop wherever it has reason to expect him, it can do little else, its trains cannot be on time

and the traveling public must suffer." (3 Elliott on Railroads, sec. 1250.)

Upon the facts, this case cannot be distinguished from *Egan* v. *Montana C. Ry. Co.*, 24 Mont. 569, 63 Pac. 831. In the *Egan Case* this court followed the common-law rule. The plaintiff was considered first as a trespasser and the general rule announced as above. The court then proceeded: "But if it be conceded that at the time of the accident the plaintiff was upon the track by tacit permission only, without any invitation, express or implied, his case is not bettered, for he went and remained there at his own risk, and to such a licensee by sufferance and tolerance (if the expression may be used to describe the plaintiff) no duty was imposed by law on the defendants other or greater than they would have owed to a naked trespasser. Sound reason and the decided weight of authority are in accord with these views." The doctrine of that case, as applied to a licensee, has been affirmed in *Beinhorn* v. *Griswold*, 27 Mont. 79, 94 Am. St. Rep. 818, 59 L. R. A. 771, 69 Pac. 557, and in *Montague* v. *Hanson*, 38 Mont. 376, 99 Pac. 1063; and the same rule of liability was applied in *Glover* v. *Chicago, M. & St. P. Ry. Co.*, 54 Mont. 446, 171 Pac. 278.

Counsel for respondent contend that by declarations contained in later cases this court has discredited the rule of the *Egan Case*, and, if not, that it is now time that the rule was abandoned altogether. With reference to the first contention it is sufficient to say that counsel are mistaken. A careful review of the cases cited will disclose that the rule of liability, as applied to a licensee, has been adhered to consistently ever since the decision of the *Egan Case*. The argument in support of the second contention should be addressed to the legislative assembly. This court is not a law-making body.

When the territory of Montana was organized, one of the [6] firsts acts of the legislative assembly was to declare that the common law of England should be the rule of law and decision in all the courts, except in so far as it was inconsistent with the Organic Act or the Acts of the territorial legislature.

(Bannock Statutes, sec. 356.) That Act was continued in force from January 11, 1865. When the Codes were adopted in 1895, it was declared: "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States or the Constitution or laws of this state or of the Codes, is the rule of decision in all the courts of this state." As if to make assurance doubly sure, that declaration was repeated three times. It was carried into the revision of 1907 and is now found in sections 3552, 6213 and 8060, Revised Codes. The rule has not been altered by our legislature, nor does it conflict with the supreme law of the land, or with the Constitution or statutes of this state. For this court to assume to change it, would be nothing short of judicial legislation.

Under the decision of the *Egan Case* and other cases approving it, the complaint does not state a cause of action, and under plaintiff's own theory, it cannot be made to do so. The judgment is therefore reversed and the cause is remanded, with directions to dismiss the action.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY, MATTHEWS and COOPER concur.

Rehearing denied February 24, 1920.

BRANGE, RESPONDENT, *v.* BOWEN, APPELLANT.

(No. 4,073.)

(Submitted December 13, 1919. Decided January 2, 1920.)

[186 Pac. 680.]

Trial Practice—Reopening Case—New Trial—Insufficiency of Evidence—Discretion—Appeal and Error.

1. A motion to reopen a case after closing of the testimony and settlement of the instructions, for the purpose of offering a writing in evidence, and one for a new trial upon the ground of insufficiency of the evidence, were addressed to the sound, legal discretion of the trial court, its orders upon which cannot be disturbed on appeal except for clear abuse of such discretion.

Appeal from District Court of Granite County; Geo. B. Winston, Judge.

ACTION by Charles Brange against D. T. Bowen. Judgment for plaintiff. Defendant appeals from it and an order denying him a new trial. Affirmed.

Mr. D. M. Durfee, for Appellant, submitted a brief.

Mr. Lester H. Loble, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The evidence in this case is in sharp conflict. After the testimony was closed and the instructions were settled, defendant moved the court to reopen the case that a document might be offered in evidence. The motion was denied. After a verdict was returned in favor of plaintiff, defendant moved for a new trial upon the ground of insufficiency of the evidence. That motion also was denied.

In each instance the motion was addressed to the sound, legal discretion of the trial court, and its order thereon will not be disturbed unless there was a clear abuse of discretion. (*Jones* v. *Shannon,* 55 Mont. 225, 175 Pac. 882; *Cole* v. *Helena Light & Ry. Co.,* 49 Mont. 443, 143 Pac. 974.)

The record fails to disclose that any error was committed, and the judgment and order are, therefore, affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

PEARCE, RESPONDENT, *v.* METROPOLITAN LIFE INSURANCE CO., APPELLANT.

(No. 4,072.)

(Submitted December 13, 1919. Decided January 2, 1920.)

[186 Pac. 687.]

Contracts—Insurance—Commissions.

Contracts—Insurance—Commissions.

1. Where, under a contract between a life insurance company and its agents, the latter were to receive as compensation only such commissions as should be included in premiums collected and paid to the company during the period of their employment, they were not entitled to commissions on premiums after they had left the company's employ.

Same—Construction—Duty of Courts.

2. Courts will not, in the absence of an attack on its validity, interfere with a contract, nor make a new one for the parties.

Appeal from District Court of Silver Bow County; J. J. Lynch, Judge.

ACTION by Steven Pearce against the Metropolitan Life Insurance Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded, with directions.

Messrs. Day & Mapes, for Appellant, submitted a brief; *Mr. E. C. Day* argued the cause orally.

Messrs. Mackel & Tyvand, for Respondent, submitted a brief; *Mr. H. A. Tyvand* argued the cause orally.

MR. JUSTICE HURLY delivered the opinion of the court.

Plaintiff sues for commissions alleged to have been earned in the sale of certain policies of insurance issued by the defendant corporation, and also for like commissions alleged to have been earned by four other agents for similar services whose claims therefor were assigned to him.

For answer, the defendant admits the agency of plaintiff and [1] of the respective assignors and the issuance of the policies, but alleges that each of such agents, before accepting employ-

ment with the defendant company, entered into an agreement with it under which he was to receive, as his compensation, only such commissions as should be included in premiums collected and paid over to the company during the period of his employment. The answer further alleges payment to plaintiff and his assignors of all commissions so earned and collected during the time of such service.

Upon the trial, plaintiff and the agents whose claims had been assigned to him (with the exception of Agent Tregonning, who was not called as a witness) admitted that they had each received in full the amount of all such commissions upon premiums collected prior to the time of leaving the service of the company, except that Agent Scott testified that the sum of $8.52 in commissions collected by the company before he left its employment had not been paid him. Such witnesses also identified certain applications for employment signed by them before entering the service of the company. Each of these applications contained the following proviso: "I further agree, if my appointment as agent is approved by the company, that my compensation shall be in accordance with the present schedule of salaries or commissions, or both, payable to agents, and as the schedule or terms thereof shall be amended by the company from time to time; that I will abide by all the rules and regulations of the company as embodied in the Agent's Instruction Book and otherwise, and as they may be subsequently amended."

The instruction book referred to in the applications for appointment was also identified, containing the following clause with reference to compensation of agents:

"The compensation in the Ordinary Department will be the commission as allowed by the Company and as set forth by its rules from time to time. No ordinary commission shall be payable or be due until the full amount of premiums collected has been received by the Company, and such commissions as shall have been paid up to the date of resignation or up to the date of the termination of an agency by the Company shall be

in full payment and satisfaction for services rendered, and in full for all claims against the Company."

Plaintiff called as a witness one P. H. Puxley, who testified that he was in possession of the books of the company and familiar with the same. He then identified certain exhibits as copies made from the books of the company, showing the amounts of the policies upon which commissions were claimed, rate of commission, premiums and commissions paid while the agent was in service, total commissions payable, and commissions unpaid, *etc.* It was admitted by the defendant that these exhibits were correct transcriptions from the books of original entry kept in the ordinary course of business, and all were admitted in evidence without objection. As to Agent Tregonning, the only evidence offered in his behalf was one of such transcripts from the books of the company, showing a total amount of unpaid commissions in his favor of $104.16. This, taken in connection with the pleadings, made a *prima facie* case upon such cause of action. The defendant did not produce nor offer any proof that he had signed a contract such as that signed by the other agents, nor that he had in fact any written contract at all. There being no evidence to rebut this *prima facie* case, the court was justified, particularly in view of defendant's motion for a directed verdict, in deeming as established by the proof that verdict for such sum should be allowed upon the cause of action embracing his claim.

At the close of the testimony the defendant moved for a nonsuit upon grounds similar to the allegations of defense in the answer. This motion was denied, whereupon the court of its own motion directed judgment for the plaintiff for the full amount of commissions unpaid, as disclosed by the exhibits referred to.

Certain rulings were made restricting defendant's examination of the witness Puxley. The plaintiff having shown the knowledge of this witness as to the company's books and records, their possession by him, and having questioned him concerning entries therein, the defendant was entitled to inquire

freely concerning the same. However, this could only affect the cause of action based upon Scott's services, and, as above indicated, in an inconsequential amount not sufficient to justify a new trial.

As to the causes of action based upon Scott's and Tregonning's services, the record discloses without uncertainty the amounts remaining as $8.52 due the former and $104.16 due the latter, for which sums, with interest as prayed for in the complaint, judgment in favor of the plaintiff should be rendered.

The pleadings of plaintiff do not, except by general denial, question the contract as alleged by the defendant; nor does plaintiff's evidence in any manner tend to show any mistake or [2] misconception as to the same. The courts, in the absence of an attack upon their validity, may not interfere with such contracts as may be entered into between parties, nor may they make new contracts for them. It appearing, without dispute, from the testimony that the commissions remaining unpaid to Pearce, McArthur and Leahy were all collected after they left the company's employment, nothing was due them under the contract and the causes of action based thereon should be dismissed. With the exception of $8.52, all commissions not paid to Scott were collected after he left the service of the company. Objection is made that no competent testimony was offered in behalf of Scott's claim to show that this sum was so collected. However, we think there was sufficient competent evidence to make a *prima facie* case thereon. As to the balance of his claim, he should not recover.

The judgment is reversed and the cause remanded to the district court, with directions to enter judgment as herein indicated, each party to bear his own costs of appeal.

Remanded with directions.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, MATTHEWS and COOPER concur.

Rehearing denied February 25, 1920.

HARWOOD, APPELLANT, v. SCOTT, ADMX., RESPONDENT.

(No. 4,071.)

(Submitted December 13, 1919. Decided January 2, 1920.)

[186 Pac. 693.]

Estates of Deceased Persons—Claims Against—Executors and Administrators — Actions on Rejected Claims — Variance— Witnesses—Competency.

Executors and Administrators—Claim Against Estate—Action on Claim—Witnesses—Competency.

1. An attorney is competent to testify in his action against an administrator to recover fees for services rendered the estate as to transactions between himself and the decedent, the district court being granted discretion by section 7891, Revised Codes, to permit such testimony when, without it, injustice will be done, and qualified to verify his claim against the estate.

Same—Disallowance of Claim—Action—Complaint.

2. Where a claim against an estate is disallowed by the executor or administrator, the suit brought by the claimant must be upon the identical claim presented for payment.

Same—Presentation of Claim—Sufficiency.

3. If the presentation of a claim against an estate, which was rejected, advised the executor or administrator of its nature, the amount claimed, and was explicit enough to bar another action on the same demand, it was sufficient; an observance of the technical rules of pleading not being required.

Same—Presentation of Claim—Complaint—Variance—What Does not Constitute.

4. Where the only difference between a claim presented to and rejected by an administrator, and the complaint in an action on the rejected claim, was one of phraseology and not of substance, the district court was not warranted in dismissing the action on the ground of fatal variance between the claim and the complaint.

Appeal from District Court of Silver Bow County; J. J. Lynch, Judge.

ACTION by E. N. Harwood against Sibyl Scott, as administratrix of the estate of Rachel E. Williams, deceased. Verdict for plaintiff, who appeals from that part of the judgment which dismisses the first of his three causes of action. Reversed and remanded.

Cause submitted on briefs of Counsel.

Mr. J. A. Poore, for Appellant.

Must a claim against an estate, presented to the executor or administrator for allowance, state all material facts whereby the obligation embraced therein was created and exists? The authorities cited below, and in fact all authorities found on that subject, although only more recent ones directly in point are cited, give a negative answer to that question. (*Estate of Swain,* 67 Cal. 637, 8 Pac. 497; *Pollitz* v. *Wickersham,* 150 Cal. 238, 88 Pac. 911; *Elizalde* v. *Murphy,* 163 Cal. 681, 126 Pac. 978; *Goltra* v. *Penland,* 42 Or. 18, 69 Pac. 925.)

It is held that the statutes on the subject here under consideration should be liberally construed and applied as "remedial statutes." (*Empire State Min. Co.* v. *Mitchell,* 29 Mont. 55, 74 Pac. 81; *Dorias* v. *Doll,* 33 Mont. 314, 83 Pac. 884; *Cullerton* v. *Mead,* 22 Cal. 95, 96.)

Mr. J. E. Healy, for Respondent.

Plaintiff was incompetent to testify against deceased. (Rev. Codes, sec. 7891, subds. 3 and 4; sec. 7892, subd. 2; *Delmoe* v. *Long,* 35 Mont. 139, 149, 88 Pac. 778; *Munger* v. *Myers,* 96 Kan. 743, 153 Pac. 497; *Vance* v. *Whitten,* 51 Okl. 1, 151 Pac. 567; *Brown* v. *Brown,* 96 Kan. 510, 152 Pac. 646; *Wheatley* v. *Kissinger,* 61 Colo. 264, 156 Pac. 1099; *Pearson* v. *Parsons,* 173 Cal. 331, 159 Pac. 1171; 18 Cyc. 886–888.)

The plaintiff being incompetent as a witness could not verify the claim, and his attempted verification was a nullity.

The same claim must be sued upon as was presented, none other, and the cause of action must be within the presented claim. (*Brown* v. *Daly,* 33 Mont. 523, 84 Pac. 883; *Vanderpool* v. *Vanderpool,* 48 Mont. 448, 138 Pac. 772; *Barthe* v. *Rogers,* 127 Cal. 52, 59 Pac. 310; *Lichtenberg* v. *McGlynn,* 105 Cal. 45, 38 Pac. 541; *Stockton Sav. Bank* v. *McCown,* 170 Cal. 600, 150 Pac. 985.) Knowledge on the part of the administrator does not affect the proper presentation of a claim, just as if no such knowledge existed. (18 Cyc. 886, note 19.)

The claim presented was not put upon the basis of an action or claim for the reasonable value of the services or upon an account stated or upon the basis of submission to arbitration. It was based upon the false and untenable ground that the judgment and decree and order of the court were in favor of Harwood and against the estate of Rachel E. Williams. And this was upon a matter of which the probate court had no jurisdiction as between Harwood and Rachel E. Williams, and this was particularly true, as far as the presented claim showed, and by this presented claim the legal representative was bound. (*Briggs* v. *Breen*, 123 Cal. 657, 56 Pac. 633, 886; *Hicox* v. *Graham*, 6 Cal. 167; *Henry* v. *Superior Court*, 93 Cal. 569, 572, 29 Pac. 230; *Stevens* v. *San Francisco etc. R. R. Co.*, 103 Cal. 254, 37 Pac. 146; *Estate of Kruger*, 123 Cal. 391, 55 Pac. 1056; *Sullivan* v. *Lusk*, 7 Cal. App. 186, 94 Pac. 91, 92; *Hickman-Coleman Co.* v. *Leggett*, 10 Cal. App. 29, 100 Pac. 1072; *Brown* v. *Quinton*, 80 Kan. 44, 18 Ann. Cas. 290, 25 L. R. A. (n. s.) 71, 102 Pac. 242; *Golden Gate Undertaking Co.* v. *Taylor*, 168 Cal. 94, Ann. Cas. 1915D, 742, 52 L. R. A. (n. s.) 1152, 141 Pac. 922, 924; 18 Cyc. 273.)

MR. JUSTICE MATTHEWS delivered the opinion of the court.

On August 14, 1906, Rachel E. Williams, as administratrix of the estate of Henry Williams, deceased, filed in the district court of Silver Bow county her fourth annual report and account, in which she recited, among other things: "Aug. 12th. By amount due E. N. Harwood, for services and counsel as attorney, rendered on behalf of the estate of Henry Williams, in [cases pending, *etc.*] from Aug. 12th, 1905, to Aug. 12th, 1906, subject to allowance of the above-entitled court, Voucher No. 763 ..... $1,800.00." The account was finally submitted to the court on February 5, 1906, and by the court taken under advisement. On March 3, Rachel E. Williams died, and thereafter the court rendered its decree settling and allowing the said account, and caused the decree to be entered *nunc pro tunc*

as of February 18, 1906. In its said decree the court made the following findings and order: "The sum of $1,800 is a reasonable and just amount to be allowed said administratrix for the services rendered by her said attorney during the period mentioned * * * and the credit of said $1,800 ought to be and is hereby allowed the administratrix as reasonable compensation for the said services rendered by the said attorney on behalf of the estate, as specified in the account * * * ."

On May 16, 1916, the defendant, Sibyl Scott, was appointed administratrix of the estate of Rachel E. Williams, and on October 10, 1916, being within the time allowed by law, Harwood filed a claim with said administratrix against the estate of Rachel E. Williams, verified by himself by affidavit conforming to the statutory requirements, which claim recited: "For the principal amount allowed to said *E. N. Harwood* by decree and order of the above entitled court, as entered Feb. 18th, 1906, a copy of which is hereto attached, for legal services rendered by him for and on behalf of the said Rachel E. Williams, as administratrix of the estate of Henry Williams, deceased, prior to the said date, for which she received credit in her account as administratrix, approved and allowed by the court, but said sum and no part thereof has been paid to the said E. N. Harwood.....$1,800.00." For interest on the principal sum; for $500 for services from August 12, 1906, to the date of the death of said Rachel E. Williams, rendered for the estate, and an additional claim for $500 for professional services rendered said Rachel E. Williams personally, during the same period, with interest on each of the latter sums claimed.

This claim being deemed disallowed, Harwood commenced action within three months, stating three separate causes of action, the first for the $1,800 with interest; the second for $500 with interest; and the third for $500 with interest.

A general demurrer was interposed and overruled; whereupon an answer was filed, denying generally the allegations of the complaint, and pleading, as a special defense, that all the

indebtedness of Rachel E. Williams to plaintiff, had been discharged by payment, which was controverted by reply.

On the trial, the court excluded all evidence as to the first cause of action, and, finally, by order, dismissed the first cause of action, on the ground and for the reason that "the claim alleged in the complaint is different from the claim filed with the administratrix; that the claim filed with the administratrix was based on an order or decree of court; that the claimant assumed that it was a judgment in his favor and acted accordingly. * * * That the claim sued upon is not a claim on a judgment, but upon an express contract for services rendered." The parties thereupon proceeded to trial upon the second and third causes of action, resulting in verdict for plaintiff. Plaintiff appeals from that portion of the judgment dismissing his first cause of action.

The charging part of the first cause of action stated as follows: "3. That during said period of time from the twelfth day of August, 1905, to the twelfth day of August, 1906, plaintiff, at the special instance and request of said Rachel E. Williams, as said administratrix and under employment by her as her attorney and counselor at law as administratrix, rendered and performed professional legal services and counsel * * * in and about matters and things appertaining to said estate * * * , mentioned in the fourth annual account and report of said * * * administratrix * * * and mentioned in the decree of said court thereafter duly made * * * , a copy of which * * * marked Exhibit 'A' is hereto annexed as a part hereof.

"4. That * * * said Rachel E. Williams promised and agreed to pay plaintiff the sum of $1,800, or whatever portion thereof said court * * * found to be reasonable and just * * * at the time said court by its decree settled and approved said account. * * * And said Rachel E. Williams stated in her said account that there was due plaintiff the sum of $1,800 for said legal services. * * * .

"5. That in said decree and order said court found * * * that said sum of $1,800 is a reasonable and just amount," *etc.* (quoting the language of the order).

That, by said agreement and the order and decree of the court, the said sum became due and payable to plaintiff from Rachel E. Williams, and that no part thereof has been paid.

The respondent contends: (1) That plaintiff was incompetent, under sections 7891, 7892, Revised Codes, to testify, and therefore incompetent to verify his claim, and the claim as presented was therefore as though not verified and invalid. (2) That the claim sued upon was not the claim presented to the administratrix, and therefore the judgment of the court in dismissing the case as to the first cause of action was correct.

[1] 1. With reference to counsel's first contention, he has evidently overlooked the fact that section 7891, Revised Codes, was amended February 28, 1913, before the filing of the claim, by granting to the court discretion to permit testimony concerning direct transactions between the parties named in the section, "when it appears to the court that without the testimony, injustice will be done." (Laws 1913, p. 57.) The contention is without merit; the claimant was qualified under the law to verify his claim, and, on a trial on its merits, might either have proven his case without taking the stand himself, or he might have secured permission of the court to testify as to transactions between himself and decedent.

2. In upholding the action of the trial court, dismissing the first cause of action, it is claimed by the respondent that the presentment was what was erroneously assumed to be of a judgment in favor of the claimant, while the suit was upon an account stated or for the reasonable value of the services rendered, and relies upon the following cases: *Brown* v. *Daly,* 33 Mont. 523, 84 Pac. 883; *Vanderpool* v. *Vanderpool,* 48 Mont. 448, 138 Pac. 772; *Barthe* v. *Rogers,* 127 Cal. 52, 59 Pac. 310; *Lichtenberg* v. *McGlynn,* 107 Cal. 45, 38 Pac. 541; and *Stockton Savings Bank* v. *McCown,* 170 Cal. 600, 150 Pac. 985. We think, however, that a careful examination of these cases and

other authorities construing similar claims and demands will disclose the distinction between those cases wherein there is found to be a fatal variance between the claim presented and the claim upon which suit was brought, and actions wherein there appears merely an immaterial variance in form or phraseology in the claim and the complaint.

It is unquestionably the law that the holder of a claim against an estate must present it to the administrator within the time [2] prescribed (Rev. Codes, sec. 7532), and, if disallowed, suit must be brought upon the identical claim presented; and this court has so declared in the cases of *Brown* v. *Daly* and *Vanderpool* v. *Vanderpool*, cited above. However, in each of these cases, the claim sued upon was clearly a different claim from that presented to the administrator.

In *Brown* v. *Daly*, plaintiff and his wife held a joint contract. Each presented a claim to the administrator for a sum alleged to be due, being one-half of the amount that would have been due on the joint contract. They thereafter sued jointly on the entire contract. The court held that "where a promise is made to two or more persons jointly, all obligees must unite as plaintiffs in an action for the breach thereof, as the cause of action in such cases is joint only" (15 Ency. Pl. & Pr. 528, and cases cited); that the claim must be presented and rejected, and claimant may then bring suit upon the claim. The court then proceeds: "What claim? It goes without saying that it is the identical claim which was presented; otherwise the law would be a dead letter. If a party may present to the executor of an estate a claim founded upon the breach of a several contract, and upon its disallowance maintain an action against the estate for a breach of a joint contract, without presenting any claim founded upon such breach, the statute would become at once of no efficacy whatever and its purpose would be circumvented."

In the *Vanderpool Case*, the claim presented was based upon an open account for money loaned; the suit was brought upon a promissory note.

In *McGrath* v. *Carroll,* 110 Cal. 79, 42 Pac. 466, claim was presented upon a simple money demand; suit was brought for moneys held and received by deceased in trust for plaintiff. And in each of the California cases cited, the facts clearly disclosed that the claim sued upon was not the identical claim presented to the executor or administrator.

Each case must be determined on its own peculiar set of [3] facts. Not every variance between the claim presented and the allegations of the complaint is fatal to recovery. (Ross on Probate Law & Practice, 555.) No particular form of presentation is required; it is sufficient "if the presentation advises the administrator or executor, of the nature of the claim and the amount, and shows enough to bar another action on the same demand." (*Hamilton* v. *Blakeney* (Okl.) 165 Pac. 141.) Nor does the law contemplate that "the technical rules of pleading shall be observed in stating claims against an estate of decedents," but only that "the presentation should disclose a *prima facie* right to recovery and should have a tangible form and substance such as will enable the executor or administrator to act intelligently." (11 R. C. L., sec. 214, and cases cited.)

In the case of *Hamilton* v. *Blakeney,* cited above, plaintiff had presented to the administrator a claim for services as attorney in several cases, merely giving, in the claim, the title of the case and the amount of attorney's fees charged; in his complaint and second cause of action, plaintiff sued as upon an express contract for services. It was urged on behalf of defendant that the claim presented was a statement of an open account, on *quantum meruit,* and that the action was brought on an express contract, and that such action was a departure from the claim presented. The court, after reviewing the cases cited in support of the contention, disposed of the matter as follows: "It is true that in an action against the estate of a decedent, it is necessary for the plaintiff to show that the claim has been properly presented to the administrator or executor of said estate and rejected, and that the recovery must be upon the same causes of action as were set up in the claim. In Ross,

Probate Law & Practice, 555, it is said: 'A creditor cannot come into court and allege and prove another or different contract or cause of action than the one stated in his claim. Of course not every variance is fatal. The statement of facts in the complaint additional to those set forth in the claim is unobjectionable, when they are merely explanatory of the demand and do not change the cause of action.' The claim presented to the defendant showed that the plaintiff claimed that the estate of decedent was liable to him for attorney's fees in the respective cases described in the claim. The claim against an estate required to be filed by our statute need not be in any particular form. If it advises the administrator or executor of the nature of the claim and the amount demanded, and shows enough to bar another action for the same demand, it is sufficient. Upon the rejection of the claim by the executor, without a demand for further information, or of exhibits or proof of the claim, the plaintiff was entitled to maintain an action for the amount of his claim upon a contract, either express or implied. * * * We do not think the claim presented differs so much from the cause of action sued on, in the absence of demand for more specific information * * * as to constitute a fatal variance." To the same effect, see *Estate of Swain*, 67 Cal. 637, 8 Pac. 497; 18 Cyc. 480; *Selna* v. *Selna*, 125 Cal. 357, 73 Am. St. Rep. 47, 58 Pac. 16; *Dorais* v. *Doll*, 33 Mont. 314, 83 Pac. 884.

Testing the claim of appellant and the recitals of his first [4] cause of action by the rules laid down, we find that his claim advised the administratrix of the nature of the claim, the amount claimed, and was sufficiently explicit to be an effectual bar to another action on the same demand, should the appellant's first cause of action be disposed of on its merits.

The chief objection to the claim is as to the showing made of the nature of the demand. The respondent interprets the claim, as to the first cause of action, as though it read: "I have a judgment for the sum of $1,800, and interest at the legal rate of 'allowed by said decree' in the sum of $1,392," and the court,

in dismissing the said first cause of action, adopted that interpretation. We do not think that a reading of the claim as presented, warrants such assumption. It is true that the claim reads, "For the principal amount allowed to said *E. N. Harwood* by the decree and order of the above entitled court," *etc.;* but it further recites, "for which she [Rachel E. Williams] received credit in her account as administratrix, approved and allowed by the court."

The complaint declares on the same contract set up in the claim presented, recites the making, filing and presentation of her account to the court, and the order and decree of the court approving and allowing the said amount of $1,800 to the administratrix for the services so rendered by appellant. Appellant attached, not only to the claim, but to the complaint a copy of the account and decree of settlement and allowance, as a part of each instrument; it was one and the same claim, to-wit, the claim of appellant for the sum of $1,800 alleged to be due for services to Rachel E. Williams, as administratrix, for the period named, allowed and approved by the court.

While there is a difference in the wording of the claim and the recitals of the first cause of action, the difference is one merely of phraseology and not of substance, and we do not consider that there is such a departure as to constitute a fatal variance.

That portion of the judgment of the trial court dismissing said first cause of action is reversed, and the cause remanded for the proper trial of the said cause of action.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

Rehearing denied January 23, 1920.

HELENA LIGHT & RY. CO., APPELLANT, v. NORTHERN PACIFIC RY. CO., RESPONDENT.

(No. 4,063.)

(Submitted December 12, 1919. Decided January 2, 1920.)

[186 Pac. 702.]

Contracts—Lease—Renewal—Extension—Electricity—Public Utility Act—Statutory Construction—Presumptions.

Contracts—Undisclosed Motive or Inducement—Effect on Contract.

1. A motive for entering into a written contract, or an inducing cause in the mind of one of the parties to it, undisclosed to the other, cannot after its execution be read into it as a part of the consideration.

Same—Intent of Parties—When Material.

2. The circumstances under which a contract was made, or the intent of the parties at the time, are only material when the contract is ambiguous in some of its terms.

Same—Lease—Electricity—What not Breach.

3. Where a contract between a railway company and an electric light and power company obligated the latter to deliver to the former such an amount of electric current as the railway company might require at certain points on its line of road, but did not make it obligatory upon the latter company to receive current at each of the points enumerated, the abandonment of the use of electric power at one of such points was not a breach of the contract.

Same—Renewal—Extension—Definition.

4. An option to renew a contract is the right to require the execution of a new one—which does not constitute a present demise; an option to extend is a present demise which operates to extend the term of the original agreement, which then becomes a contract for both the original and extended term.

Same—Construction.

5. In construing provisions of a contract of the nature referred to in paragraph 3 above, which provided, among other things, for its "renewal" in a certain event, courts look to the reading of the entire agreement and to the practical construction given to it by the parties themselves, rather than to the phraseology used.

Same—Courts will Uphold.

6. If upon a reasonable construction contracts may be upheld, courts will uphold them.

Same—Option to Renew—Nature of Right.

7. An option to renew a contract of lease by giving proper notice prior to the expiration of the term fixed was a substantial right acquired by the lessee as a part of the original contract, and constituted a substantial obligation on the part of the lessor.

Same—Renewal—Extension—Nature of Privilege.

8. Defendant railway company was given the right to "renew" a contract with an electric light and power company for light and power for an additional term of five years on giving thirty days' notice before expiration of the first term. The power company had not bound itself to execute a new contract and the railway company did not demand one, but gave the required notice at the proper time. *Held*, that the

notice given had the effect of extending the original contract for the additional term, and that the contract then became one for the original and the extended term—a demise *in praesenti* as of the date of the original contract.

Same—Renewal—Extends to What Clauses of Contract.

9. A renewal or extension of a contract of the nature of the above, under like provisions, extends the contract with respect to all of its terms and conditions, except the one referring to the extension clause; and hence is not objectionable as creating a perpetuity.

Same—Electricity—Public Utility Act—Effect on Existing Contracts.

10. *Held*, that since section 12 of the Public Utility Act (Chap. 52, Laws of 1913) exempts from the operation of the Act all "existing contracts," and does not exclude from the provisions of the exempting clause renewals or extensions of such contracts, the renewal or extension of the contract referred to in paragraph 8, *supra*, which contract was executed before the passage of the Act and would have expired after it went into effect but for its extension, was not unlawful. (MR. JUSTICE HOLLOWAY dissenting.)

Same—Impairment of Obligation—Constitution.

11. An Act which, in any degree, modifies the obligation of a contract, by attempting to relieve one party from a duty assumed under it, is repugnant to the constitutional prohibition against the impairment of the obligation of contracts.

Statutes and Statutory Construction—Presumptions.

12. The legislature is presumed to have understood the meaning of the words used in legislation, and that the words used were used in the common and ordinary meaning.

Appeal from District Court of Lewis and Clark County; R. Lee Word, Judge.

ACTION by the Helena Light & Railway Company against the Northern Pacific Railway Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Mr. Odell W. McConnell, for Appellant, submitted a brief and argued the cause orally.

The promises in the contract in controversy are mutual and dependent. The plaintiff agreed to furnish power; the defendant agreed to take power. "The courts at the present day incline strongly against the construction of promises as independent, and in the absence of clear language to the contrary promises which form the consideration for each other will be held to be concurrent or dependent and not independent, so that a failure of one party to perform will discharge the other; so that one cannot maintain an action against the other without showing performance or a tender of performance on his

part." (9 Cyc. 643.) Since the decision of the leading case in England of *Hoare* v. *Rennie*, 5 Hurl. & N. 19, it has been held that the breach of an entire contract by one party gives the other the right of rescission. In *Mersey Steel & Iron Co.* v. *Naylor etc. Co.*, 9 App. Cas. 434, the House of Lords held that if one party to a contract refuses absolutely to pay for a part of the goods contracted for, the other party may rescind. The American courts have followed the doctrine above stated. (*Norrington* v. *Wright*, 115 U. S. 188, 29 L. Ed. 366, 6 Sup. Ct. Rep. 12.) This rule should certainly work both ways. (See, also, *Baker* v. *Higgins*, 21 N. Y. 397; *Clark* v. *Wheeling Steel Works*, 53 Fed. 494, 3 C. C. A. 600; *Blackburn* v. *Reilly*, 47 N. J. L. 290, 54 Am. Rep. 159, 1 Atl. 27.)

In this case the defendant railway company has certainly evinced an intention no longer to be bound by the terms of the contract in refusing to accept or pay for any more power at the pumping station. (Clark on Contracts, p. 660.)

Even if the contract is divisible, the power company is entitled to rescind, for the reason that the railway company broke a portion of the contract deliberately and intentionally. "A party to a contract not in default may terminate it on the failure of the other to comply with it in matters which are of the substance thereof, though the default is not of such nature as to defeat its whole purpose." (*Ballance* v. *Vanuxem*, 191 Ill. 319, 61 N. E. 85.) Plaintiff did not insist upon a forfeiture of the contract when the railway company ceased to use power. The mere fact that it did not insist upon the forfeiture does not prevent it from refusing a renewal of the contract. (*Swift* v. *Occidental Mining etc. Co.*, 141 Cal. 161, 74 Pac. 700; *Behrman* v. *Barto*, 54 Cal. 131.)

If there is to be a renewal of the contract, it would have to be renewed in the same terms as the old one, which the defendant expressly says is not to be done. "A general covenant to renew * * * imports a new lease like the old one upon the same terms and conditions." (24 Cyc. 991.) The defendant has given up a portion of the contract; it does not want it any

more. It has abandoned the use of the contract for power and simply wants to use it for lighting only. It cannot abandon a portion of the contract and take it as to the rest. "After a voluntary surrender of a part of the promises, the tenant cannot insist upon a renewal of the lease as to the balance." (*Barge* v. *Schiek*, 57 Minn. 155, 58 N. W. 874.)

Since the contract in question was entered into on the third of December, 1909, a statute has been enacted declaring it to be unlawful for any public utility, such as the plaintiff, to grant any concession or special privilege or make any charge for service at any different rate than that fixed by the Public Service Commission. If the contract now sought by the defendant is entered into, it will be in direct violation of this statute, because the rates as fixed by the Public Service Commission are not the same as those contained in the agreement, the latter being much lower. This contract, if renewed, would give the railway company an undue and unreasonable preference. All contracts entered into are subject to the laws of the state where made.

A case similar to the one at bar is that of the *Public Service Electric Co.* v. *Board of Public Utility Commrs.*, 87 N. J. L. 128, 93 Atl. 707. In that case the electric company had agreed to furnish, and was furnishing, the city of Plainfield with electric lights in its public buildings for the consideration of the city allowing the company to place its poles on its streets. For five years the company continued to do this until a statute similar to the one we have was passed, which rendered such a contract unlawful. The supreme court of New Jersey, in that case, said: "We think, however, that the Public Utilities Act in forbidding discrimination made the performance of this contract unlawful, and that, therefore, the prosecutor could not continue to perform the contract without being guilty of a violation of that statute." (Pollock on Contracts, 406; Pomeroy on Contracts, 280; Parsons on Contracts, 675; *Louisville & Nashville Ry. Co.* v. *Mottley*, 219 U. S. 467, 34 L. R. A. (n. s.) 671, 55 L. Ed. 297, 31 Sup. Ct. Rep. 265 [see, also, Rose's U. S. Notes].)

Messrs. Gunn, Rasch & Hall, for Respondent, submitted a brief; *Mr. E. M. Hall* argued the cause orally.

In the agreed statement of facts it is admitted that the inducing cause or reason for entering into the contract by the plaintiff at the rates named was that the defendant was to use electric current and power at its pumping station. This admission is made subject to the right of the defendant to object to the competency, immateriality and admissibility thereof. The plaintiff further admits, however, that it "did not state to the defendant what the inducing cause or reason was for entering into said contract"; it also admits that defendant made no representation as to the amount, time, manner or places of using the current other than the statements in the contract contained. For this reason the defendant had no knowledge of what was the inducing cause or reason for the plaintiff entering into such contract, and is not in a position, therefore, to deny that such was the inducing cause or reason, as the same was never communicated to the defendant. Therefore, while the defendant admits, subject to objection, that such was an inducing cause or reason, unexpressed by the plaintiff at the time of making the contract, we insist that the same is wholly incompetent, immaterial and inadmissible for the purpose of showing failure of consideration, modifying the terms of this contract, or for any other purpose under the statutes and decisions of this state.

The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument. (Rev. Codes, secs. 5018, 7873; *Kelly* v. *Ellis,* 39 Mont. 597, 104 Pac. 873; *Armington* v. *Stelle,* 27 Mont. 13, 94 Am. St. Rep. 811, 69 Pac. 115; *Riddell* v. *Peck W. etc. Co.,* 27 Mont. 44, 69 Pac. 241; *Ford* v. *Drake,* 46 Mont. 314, 127 Pac. 1019; *Board of Education* v. *Grant,* 118 Cal. 39, 50 Pac. 5.)

The cause or motive in inducing a party to enter into a contract, particularly where it is not communicated to the other party thereto, is no part of the consideration, and the fail-

ure of such inducing cause does not affect the validity of the contract nor relieve the parties from liability thereon. Consideration is distinguished from the motive for entering into a contract. (Elliott on Contracts, sec. 204; *Philpot* v. *Gruninger*, 14 Wall. (U. S.) 570, 20 L. Ed. 743 [see, also, Rose's U. S. Notes]; 9 Cyc. 320; Page on Contracts, sec. 155.)

The fact that the defendant did not disclose to the plaintiff the manner in which it intended to use such electric current, or the fact that it said nothing on the subject other than the terms expressed in the written contract, cannot affect the validity of the contract. (Elliott on Contracts, sec. 121; Page on Contracts, sec. 157.)

There is nothing in the terms of the contract which required the defendant to use electric current at the pumping station at all times, or to use any electric current other than such as it "may require," and so long as it paid for the current it actually used at the rates named in said contract, it was complying therewith. (*McKeever* v. *Canonsburg Iron Co.* (*Canonsburg Iron Co.* v. *McKeever*), 138 Pa. St. 184, 16 Atl. 97, 20 Atl. 938; *Brawley* v. *United States*, 96 U. S. 168, 24 L. Ed. 622 [see, also, Rose's U. S. Notes]; *Albany Power & Mfg. Co.* v. *City of Albany*, 133 Ga. 375, 65 S. E. 886.)

In *Laclede Power Co.* v. *Stillwell*, 97 Mo. App. 258, 71 S. W. 380 (a case cited and quoted from by appellant), the court construed a contract to furnish electric light. The difference in the language of that contract and the one here involved clearly shows the infirmity in the construction which the plaintiff now seeks to place upon this contract. In fact, the language of the opinion shows that had the contract there construed been worded as the one in this case, the court would have sustained the position of the company purchasing the current. (See, also, *Winslow* v. *Plimpton*, 134 Mass. 44.)

This provision of the contract, reserving to defendant the right to renew the contract upon giving thirty days' notice prior to expiration thereof, does not call for nor require a new contract and the defendant did not ask for a new or different

contract. The defendant's contention is that the contract entered into prior to the enactment of Chapter 52 of the Laws of 1913, containing the provision for the renewal thereof at the option of the defendant, is a continuing contract and still in force so long as the defendant exercised the option given it by the original contract to extend the same for an additional five year period. A covenant of renewal or right to continue a lease is a substantial part of the whole contract, and must be construed as one of the material considerations which led to its execution. (See cases cited in opinion.)

That no new lease is required when the original lease gives the lessee the option to renew for an additional term, see, also, *Sanders* v. *Middleton*, 112 Me. 433, 92 Atl. 488; *Kean* v. *Story & Clark Piano Co.*, 121 Minn. 198, 140 N. W. 1031.

Even if the abandonment of the pumping station was a breach of the contract, which would have entitled plaintiff to declare a forfeiture or to rescind the same, such breach did not in itself forfeit or rescind the contract, and if the contract was still in force when defendant elected to continue for the additional period and gave notice of such election as required by the contract, then the plaintiff is bound thereby, and cannot thereafter declare a forfeiture or rescind for something that occurred prior to receiving the notice of election to continue the contract. (*Keene* v. *Zindorf*, 81 Wash. 152, 142 Pac. 484; *Winslow* v. *Dundom*, 46 Mont. 71, 125 Pac. 136; 24 Cyc. 1357, 1359, 1361.) The acceptance of rent after a breach of the contract, known to the lessor, constitutes a waiver of such breach. (24 Cyc. 1361.)

MR. JUSTICE MATTHEWS delivered the opinion of the court.

The plaintiff instituted this action to recover from the defendant the sum of $1,016.75, alleged to be due for electricity furnished for lights and power during the months of May, June and July of the year 1915, at its special instance and request. The respondent admits the use and consumption of the electricity as alleged, but contends that said electricity was fur-

nished and was used, under a contract entered into between the parties hereto in the year 1910, under and by the terms of which the amount due was $494.50, which amount respondent duly tendered to appellant, when due.

The case was tried in the district court on an agreed statement of facts, from which it appears:

1. That on the third day of December, 1909, appellant and respondent entered into a written contract by the terms of which the appellant agreed to furnish to the respondent "all the electric current the railway company may require for lighting and power purposes at its pumping station—approximately two and a half miles west of the Northern Pacific Passenger Station, and at its roundhouse, machine-shop, car-shop, coal dock, passenger and freight stations, lunch-room, offices and other buildings and premises at Helena, Montana."

2. This contract or agreement was to continue in force for a term of five years from the date of the installation of the secondary lighting and power systems of the company, which installation was not completed until April 30, 1910.

3. The contract further provided that the railway company reserved the right, at its option, upon giving the power company thirty days' written notice prior to the expiration of the contract, "to renew the same for an additional period of five years."

4. The rates fixed by the contract for electric current for power and light were about one-third the regular rates in effect in the months of May, June and July, 1915.

5. It is agreed that "the inducing cause or reason for entering into such a contract by the plaintiff at the rates for electric current therein named was that the defendant was to use electric current and power at its pumping station—but the plaintiff did not state to the defendant what the inducing cause or reason was for entering into the contract."

6. The agreed statement of facts recited further "that at or prior to the making of said contract neither the defendant nor its agent or representatives made any statement or representa-

tion to the plaintiff, or its agents or representatives, regarding the amount of electric current to be used, or the time, manner or places of using said electric current, other than the statements and representations in said contract contained."

7. The power company performed its part of the contract, and in doing so expended the sum of $948.78, in erecting a system to supply the current at the pumping station.

8. The railway company lived up to the terms of its agreement in all particulars, save and except that on or about November 27, 1913, it abandoned its pumping station, and consequently, since that date has used no electric current at or for the pumping station, which fact was known to the power company within thirty days thereafter, and no objection or protest was made by the power company to such abandonment or discontinuance of the use of electric current at the pumping station, but continued to furnish, and collect for, electric current, as formerly under the contract.

9. That on the twenty-first day of January, 1915, and within the time provided for in the contract, respondent notified appellant in writing that it desired to renew the contract for the additional term of five years under the option contained in the contract.

10. On April 28, 1915, the appellant notified respondent in writing that it would not renew the contract, on the ground that the respondent was "guilty of a breach of the contract in part during its existence"; the breach, as stated in the notice, consisted in the abandonment of the pumping station and the discontinuance of the use of electric current at that point, which, the notice recites, "was one of the principal items of the contract and greatly influenced in making the reduced rate"; and, continuing, said notice advised the railway company that from and after May 1, the power company would furnish light and power to the railway company at the rates regularly filed with the Public Service Commission.

11. It is further agreed that the current used by respondent at the pumping station amounted to 24½ per cent of the electricity used by respondent under the contract.

The court found in favor of the railway company and rendered judgment but for the amount due under the contract, and entered its decree to the effect that the contract in question had been duly extended and continued for the additional term of five years. The appeal is from the judgment.

The question here presented is: Was there, during the months of May, June and July, 1915, a valid and existing contract in full force and effect? Appellant contends that the contract was one which could not be renewed, for the following reasons:

1. That the respondent company violated the terms of the contract by abandoning its pumping station and its refusal to take any power.

2. A renewal of a portion of the contract only is desired.

3. Such contract is unlawful under the present statute.

We will take the matters suggested up in order and under the subheads employed in appellant's brief.

1. The "inducing cause" referred to in the statement of facts [1] is relied upon to establish a breach of the contract. The contract was complete in itself, the result of the meeting of the minds of the contracting parties, and the obligations of each, as expressed, depend upon the corresponding obligations of the other, and on no extrinsic matter. (9 Cyc. 643.) Being in writing, the contract supersedes all oral stipulations of the parties. (Rev. Codes, secs. 5018, 7873.) This being so, it cannot be said that an inducing cause, in the mind of one of the contracting parties, undisclosed to the other, can thereafter be read into the contract as a part of the consideration for its execution.

Counsel contends that courts must give to a contract such a construction as was within the contemplation of the parties at the time they entered into it. This is true, but an "inducing cause" or motive, hidden in the breast of one, does not come within the rule. This court has said, in the case of *Armington* v. *Stelle*, 27 Mont. 13, 94 Am. St. Rep. 811, 69 Pac. 115: "Even if everything that was said and done at the time the lease was executed by the defendants were admissible, as defendants contend, for the purpose of showing what the con-

tract actually was, the unexpressed motive or mental reservation entertained by the defendants could not aid the court in arriving at a correct conclusion, nor could the defendants be permitted to testify to it in order to modify or add to the express words of their contract."

Mr. Elliott, in his work on Contracts, section 204, has this to say on the subject: "The 'motive' for entering into a contract and the 'consideration' of the contract, are not the same. An expectation of certain results is often the motive which leads to the formation of a contract, but neither the expectation nor the result necessarily makes the contract binding. Nothing is consideration that is not regarded as such by both parties."

Here, there was no representation by the railway company as to continuous use of electric current at any one point designated in the contract, and if the agents of the power company labored under an erroneous opinion of the value of the contract by reason of the contemplated use of current at the pumping station, uncommunicated to the railway company, the courts are powerless to assist or relieve appellant.

"Whatever may be thought of the propriety, from a moral standpoint, of holding a person to a contract into which he entered under a mistake as to a collateral material fact, the law is confronted with the necessity of adopting a rule which will make it possible to enforce contracts at all. Accordingly, the rule adopted by the great weight of authority is that mere mistake in the inducement is not operative and that a contract induced by reason thereof is perfectly enforceable and valid. A mistake of this sort is 'an error for which the law furnishes no relief.'" (Page on Contracts, sec. 155; see, also, 9 Cyc. 320; *Philpot* v. *Grunninger,* 14 Wall. 570, 20 L. Ed. 743 [see, also, Rose's U. S. Notes]; *Peck Colorado Co.* v. *Stratton,* 95 Fed. 741; *Levy & Kohn Mule Co.* v. *Kaufman,* 114 Fed. 170, 52 C. C. A. 126; *Armington* v. *Stelle, supra; Cream of Wheat Co.* v. *Crist Co.,* 222 N. Y. 487, 119 N. E. 74.)

The circumstances under which a contract is made, or the [2] intent of the parties existing at the time, are only mate-

rial when the contract is ambiguous in some of its terms. (*Bullard* v. *Smith*, 28 Mont. 387, 72 Pac. 761; *Quirk* v. *Rich*, 40 Mont. 552, 107 Pac. 821; *Ming* v. *Pratt*, 22 Mont. 262, 56 Pac. 279.)

2. *New Contract.* It is admitted by respondent that, if the contract is renewed, it does not desire to renew in so far as the use of electric current for power purposes at the pumping station is concerned. This, appellant contends, calls for a new and different contract from that originally entered into.

The contract set out in the answer obligates the appellant [3] to deliver to the railway company such an amount of electric current as the railway company may require for lighting and power at its pumping station, its roundhouse, machine-shops, car-shops, coal docks, passenger and freight depots and other buildings, at specified rates fixed by the contract, and the railway company to pay therefor in accordance with the amount of such electric current received each month. The enumeration of the points at which the electric current is to be delivered is for the information and guidance of the power company, as to where it will be required to furnish such electric current as the railway company will require; the contract does not obligate the railway company to receive electric current at each of the points enumerated, but only such electric current as it shall require at any or all of the points enumerated, during the life of the contract. The several points stated stand on equal footing. The power company cannot be heard to complain if it transpires that the railway company does not require as much current as it anticipated would be used, or that the railway company did not require current at any one point so enumerated. Were it otherwise, under the contract here under consideration, the power company could, with as much reason, complain that the railway company did not use sufficient current at any given point to make it profitable to supply current at that point. The fallacy of the position is apparent from appellant's contention that, though little or much current is used, some current must be consumed at the pumping station;

in other words, the abandonment of the pumping station constituted a breach of the contract, but the maintenance of a one Watt electric light there would not.

Respondent's notice of renewal is silent as to the pumping station and declares generally its intention of exercising, and the exercise of the option to renew the contract, and evidences the intention of the respondent to continue to use all of the electric current required by it for lighting and power purposes.

Appellant contends that there is evidenced an abandonment of the use of power and only an intention to use current for lighting purposes; the facts stipulated do not bear out this contention. From the contract and from the agreed statement of facts, it would appear clearly that the use of electric current at the roundhouse, machine-shop, car-shop, coal docks, passenger and freight depots and other buildings, was "for lighting and power," without regard to the amount of current required for either purpose.

We are of the opinion that the abandonment of the pumping station was not a breach of the contract as executed between the parties hereto, and that, if a renewal could be effected, the renewal was of the contract *in toto* and not a renewal in part.

3. *Contract Unlawful.* Section 12, Chapter 52, of the Session Laws of 1913, makes it unlawful for any public utility to make rates to any person or corporation differing from those contained in their schedule filed with the Public Service Commission, but provides that the Act shall not have the effect of suspending, invalidating or in any way affecting existing contracts.

The original contract was executed before the passage of the Public Utility Act of 1913, its expiration date and attempted renewal under the option subsequent thereto. It therefore becomes important to determine whether the option called for the execution of a new contract or the extension of the original term of the contract for an additional five years. In other words, would the contract, after the exercise of the privilege contained in the option, come within the exception contained in the final clause of section 12 of the Public Utility Act?

There is a clear distinction drawn by the authorities between [4] an option "to renew" a lease or a contract and an option "to extend" the term for a like or given period, the first being considered the right to require the execution of a new lease or contract, which does not constitute a present demise; while the latter is considered a present demise which operates to extend the term of the original agreement, which then becomes a contract for both the original and the extended term. (24 Cyc. 1008; 16 R. C. L. 389; 32 Century Dig., secs. 270–275.) The [5] contract here being in the nature of a lease by the power company to the railway company of a certain amount of its electric current, the cases construing like provisions in leases are pertinent to the question. In construing such provisions, the courts look to the reading of the entire contract and to the practical construction given to it by the parties themselves, rather than to the phraseology used. (*Wiener* v. *Graff*, 7 Cal. App. 580, 95 Pac. 167; *Shamp* v. *White*, 106 Cal. 220, 39 Pac. 537; *Howell* v. *City of Hamburg Co.*, 165 Cal. 174, 131 Pac. 130; *Butte Water Co.* v. *City of Butte*, 48 Mont. 386, 138 Pac. 195; *Robertson* v. *Drew*, 34 Cal. App. 143, 166 Pac. 838; *Skinner* v. *Davis*, 104 Kan. 467, 179 Pac. 359; *Briggs* v. *Chase*, 105 Me. 317, 74 Atl. 796; *Pflum* v. *Spencer*, 123 App. Div. 742, 108 N. Y. Supp. 344; *Mattlage* v. *McGuire*, 59 Misc. Rep. 28, 111 N. Y. Supp. 1083; *Ferguson* v. *Jackson*, 180 Mass. 557, 62 N. E. 965; *Kentucky Lumber Co.* v. *Newell*, 32 Ky. Law Rep. 396, 105 S. W. 972; *Sanders* v. *Middleton*, 112 Me. 433, 92 Atl. 488; *Kean* v. *Story & Clark Piano Co.*, 121 Minn. 198, 140 N. W. 1031; *Sheppard* v. *Rosenkrans*, 109 Wis. 58, 83 Am. St. Rep. 886, 85 N. W. 199; *Hausauer* v. *Dahlman*, 72 Hun, 607, 25 N. Y. Supp. 277.)

In the case of *Howell* v. *City of Hamburg Co.*, *supra*, where the option clause was similar to the one here, the court said: "The authorities fully support the claim of learned counsel for the plaintiff that the covenant for renewal of a lease, at the option of the lessee 'imports the giving of a new lease.' * * * On the other hand, if the lessee is simply given, by the original

lease, the option to retain the premises for a specified additional term, without the execution of any new lease; and when the lessee has given the notice of the exercise of the option * * * he is 'entitled to hold for the additional term under the original lease,' which then becomes a lease 'for both the original and extended terms' "; citing *Wiener* v. *Graff, supra.* "Although the word 'renew' is used in the eighth subdivision of the lease before us, we do not think that the giving of any new lease was within the contemplation of the parties. The *lessor* did not covenant to renew the lease; the language being that 'the privilege is hereby given the *lessee* to renew this lease,' *etc.*, which implies that the notice subsequently provided to be given by the lessee, of his intention to exercise the privilege, was the only thing essential to give the right to the additional term. This was the practical construction given to the provision by the parties; for the defendant did not demand a new lease, and the plaintiff did not give one."

In *Briggs* v. *Chase,* cited above, the court said: "The clauses of the instrument in question are found in the *habendum* which read: 'to have and to hold for the term of one year from the date hereof with the privilege on the part of the said Chase to *renew* at the same rental for any term not exceeding ten years from the expiration of said one year term.' And the following stipulation concerning the right of renewal: 'It is mutually understood that the said right of renewal as stipulated shall be wholly optional with the said Chase, and that said renewal, while in all other respects the same as in this lease, shall contain no further right of renewal except by mutual agreement.' * * * No new lease was called for. * * * It would have been precisely like the original lease except the term. This was left to the lessee. Whatever he might choose—1, 5 or 10 years—would be in exact accord with the contract of the lessor. The plaintiff could insist upon a complete fulfillment. The defendant was equally bound. A new lease would be a useless form. The defendant's election, if he made it, to continue, extended the stipulations of the original lease to his new occupancy. He

continued his tenancy. That the parties contemplated a *present demise* seems to be the only fair inference from their acts, and the other facts and probabilities in the case."

In *Hausauer* v. *Dahlman, supra,* the court said: "The complaint alleged the execution, in writing and under seal, by the defendants of a lease for one year, with the privilege to the plaintiff at their option, to renew the same for four years more at the same annual rental, and on the same conditions, on giving notice three months beforehand. * * * Here was not a mere covenant on the part of the lessor to give a new lease on demand or on certain conditions, but a covenant that the lessees themselves might at their option renew the lease for four years by giving the notice required, which notice was duly given and accepted by the defendants. * * * The covenant in this case, we believe equivalent to a covenant that on giving the required notice, the lease should continue in force for the additional term, and in either case the effect of the notice is, of itself, to create the new term without the execution of a new lease by the lessor." (Citing *Thiebaud* v. *Bank,* 42 Ind. 212; *Dix* v. *Atkins,* 130 Mass. 171; *Ranlet* v. *Cook,* 44 N. H. 512, 84 Am. Dec. 92.)

In *Kentucky Lumber Co.* v. *Newell,* 32 Ky. Law Rep. 396, 105 S. W. 972, cited above, the renewal clause read as follows: "For a period of five years with the privilege of renewal from year to year as long as the second party may want said land," *etc.* The court, in construing the clause said: "The contract, although it uses the word 'renewal' does not contemplate a renewal lease, as that term is used in the law books. The whole instrument, and the nature of the use of the leased lands as provided for in the lease, show that nothing more was contemplated than that the lessee might continue the terms by its mere election and the payment of the rent. The word 'renewal' was evidently used in the sense of extending; it being clearly shown in the document that not another term was to be agreed upon, but that the original term and use were to be extended at the option of the lessee. This is a demise *in praesenti.*"

In *Wiener* v. *Graff*, 7 Cal. App. 580, 95 Pac. 167, cited, the court said: "Upon compliance with the condition as to giving notice, the lessees would then be entitled to hold for the additional term under the original lease and not under the notice—the lease would then become a lease for both the original and the extended terms."

If upon a reasonable construction contracts may be upheld, [6] the courts will uphold them. (*Dallas* v. *Douglas*, 45 Mont. 114, 122 Pac. 275; *Lawson* v. *Cobban*, 38 Mont. 138, 99 Pac. 128.)

Here the railway company was given the option to renew the contract for an additional five years, on giving thirty days' notice to the power company, before the expiration of the contract; in giving notice of its intention to avail itself of the privilege, as in the *Howell Case*, it did not demand a new lease, but stated that "in accordance with the provisions of the contract (it) hereby elects to renew and extend the said contract for the additional period of five years," *etc.* The power company did not, by the terms of the contract, bind itself to execute a new lease, nor could it have been compelled to do so. No new lease was necessary; the rights and obligations of the parties were fixed by the terms of the original contract. The [7] option to renew the contract by giving thirty days' notice prior to the expiration of the term fixed was a substantial right acquired by the respondent as a part of the original contract and a corresponding substantial obligation resting upon the appellant power company. (*Briggs* v. *Chase*, 105 Me. 317, 74 Atl. 796; *Monihon* v. *Wakelin*, 6 Ariz. 225, 56 Pac. 735; *Quade* v. *Fitzloff*, 93 Minn. 115, 100 N. W. 660; *Wright* v. *Kaynor*, 150 Mich. 7, 113 N. W. 779.)

"No question can arise in regard to the consideration. The stipulation that the lessee should have 'the privilege of renewing' was a part of the consideration for which he took the lease, and agreed to pay the sum of $160, per year." (*Briggs* v. *Chase, supra.*)

Being a substantial right and a part of the original contract, [8] supported by the consideration for the original contract, of

which the respondent took advantage within the time prescribed for the exercise of the privilege, the notice given had the effect of extending the original contract for the additional term of five years and the contract then became one for both the original and the extended term; a demise *in praesenti*, as of the date of the original contract. (See authorities cited above, and also *Newhoff* v. *Mayo*, 48 N. J. Eq. 619, 27 Am. St. Rep. 455, 23 Atl. 265; *Sherwood* v. *Gardner*, 2 City Ct. Rep. (N. Y.) 64; *Whitmark* v. *Electric Ry. Co.*, 76 Hun, 302, 27 N. Y. Supp. 777.)

It is objected that such a construction would create a per-
[9] petuity by extending the contract even as to the clause for renewal. Here again the contract must be interpreted according to the intention of the parties. No such intention can be gathered from the reading of the contract; but one renewal is provided for and but one intended, and the authorities uniformly hold that a renewal or extension, under like provisions, extends the contract with respect to all of its terms and conditions, with the exception of the extension clause. (*Rutgers* v. *Hunter*, 6 Johns. Ch. (N. Y.) 215; *Piggot* v. *Mason*, 1 Paige (N. Y.), 412; *Ryder* v. *Jenny*, 25 N. Y. Super. Ct. 56; *Muhlenbrinck* v. *Pooler*, 40 Hun (N. Y.), 526.)

Counsel for appellant contends that the Public Utility Act
[10, 11] makes the renewal or extension of this contract for the additional five years unlawful, and cites in support of his contention, *Public Service El. Co.* v. *Board of Public Utility Co.*, 87 N. J. L. 128, 93 Atl. 707, and *Louisville & Nashville R. Co.* v. *Mottley*, 219 U. S. 485, 34 L. R. A. (n. s.) 671, 55 L. Ed. 297, 31 Sup. Ct. Rep. 265 [see, also, Rose's U. S. Notes]. The law construed in the cases cited contains no such provision as we have in section 12 of our Public Utility Act. The legislature saw fit to provide in the final clause of that section, that: "This, however, does not have the effect of suspending, rescinding, invalidating or in any way affecting existing contracts." This provision was, presumably, inserted upon the theory that an attempt to bring existing contracts within the purview of the statute would be in contravention of the federal constitu-

tional prohibition against impairing the obligation of contracts. It has since been decided, however, that: "The law is well settled that an unexpired contract does not authorize a public service company to charge a less rate for service rendered than that prescribed by effective schedules." *People ex rel. N. Y. Steam Co.* v. *Straus* (1919), 186 App. Div. 787, 174 N. Y. Supp. 868, where the court declared that "the fundamental theory of the Public Service Commission law is that there shall be but one rate for the same service"; citing *Armour P. Co.* v. *United States,* 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct. Rep. 428; *New Haven Ry. Co.* v. *Interstate Commerce Commission,* 200 U. S. 399, 50 L. Ed. 515, 26 Sup. Ct. Rep. 272; *Louisville & Nashville Ry. Co.* v. *Mottley,* 219 U. S. 467, 55 L. Ed. 297, 31 Sup. Ct. Rep. 265, 34 L. R. A. (n. s.) 611; *Portland Ry. Co.* v. *Oregon Railroad Com.,* 229 U. S. 397, 57 L. Ed. 1248, 33 Sup. Ct. Rep. 820 [see, also, Rose's U. S. Notes]; *Onondaga Golf & Co. Club* v. *Syracuse Int. Ry. Co.,* 96 Misc. Rep. 213, 160 N. Y. Supp. 693. (See, also, to the same effect, *Pennsylvania Ry. Co.* v. *Titus,* 156 App. Div. 830, 142 N. Y. Supp. 43; *Baltimore & Ohio Ry. Co.* v. *La Due,* 128 App. Div. 594, 112 N. Y. Supp. 964. In no one of the cases cited, however, did the law under consideration exempt from the operation "existing contracts." The rule is declared in these cases to be that "the law makes no distinction in favor of special contracts, nor does it exempt them from the operation of the statute." But our statute *does* exempt from the operation thereof all "existing contracts." What, then, is meant by the term "existing contracts"? We have no means of determining the legislative intent in the use of the phrase, and the authorities on the subject are necessarily meager. In the case of *Whitaker* v. *Rice & Becker,* 9 Minn. 13, 86 Am. Dec. 78, it is said that "a contract once made is an existing contract until it is paid or barred by the statute of limitations, or its obligation in some other way canceled." Under the rule that a conveyance with the intent to defraud is void as to "existing obligations," it has been held that the liability of a principal to indemnify a surety on a bond is an

"existing obligation" before default on the bond. (*Graeber* v. *Sides,* 151 N. C. 596, 66 S. E. 600.) In *Richardson* v. *Brower,* 71 Wash. 192, 127 Pac. 1098, it is held that, where a deed was given "subject to existing tenancies," the words include any and all tenancies of whatsoever nature that existed at the time of the execution of the deed.

The exempting clause in section 12 of the Public Utility Act declares that the Act shall not "in any way affect existing contracts." This is analogous to the constitutional prohibition against the impairment of the obligation of contracts, under which it is held that "if any subsequent law affect to diminish the duty or to impair the right which the law defines upon the consummation of a contract, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence any law which in its operation amounts to a denial or obstruction of the rights accruing by the contract * * * is directly obnoxious to the prohibition of the Constitution." (8 Cyc. 932; *Ogden* v. *Saunders,* 12 Wheat. 213, 338, 6 L. Ed. 606 [see, also, Rose's U. S. Notes].)

"Since the prohibition as to the impairment of the obligation of contracts is absolute, the amount of the impairment is immaterial. An Act which, in any degree, no matter how slightly, modifies the obligation of a contract, by attempting to relieve one party from any duty assumed by the contract, is repugnant to the constitutional prohibition." (6 R. C. L., sec. 319; *Farrington* v. *Tennessee,* 95 U. S. 697, 24 L. Ed. 558 [see, also, Rose's U. S. Notes]; *Smith* v. *Norfolk etc. Co.,* 112 Va. 192, 38 L. R. A. (n. s.) 1016, 70 S. E. 482; *Oshkosh Water Works Co.* v. *Oshkosh,* 109 Wis. 208, 95 Am. St. Rep. 870, 85 N. W. 376.)

It is conceded that the contract in question was valid at the time it was entered into by the parties, and up to the time of the passage of the Public Utility Act; it must be conceded that, had the contract been entered into after the passage of the Act, it would have been invalid; it must be conceded, further, that, had it not been for the incorporation, in section 12 of the Act,

of the exemption clause referred to, the contract would have been invalidated by the statute. "The legislature may control and regulate (such matters as those dealt with in the contract) under the so-called police power." (*Onondaga Golf etc. Club* v. *Syracuse Int. Ry.*, 96 Misc. Rep. 213, 160 N. Y. Supp. 693, and cases heretofore cited.) The legislature might, therefore, have placed all service by the public utility companies of the state on an equal footing, regardless of outstanding or existing contracts, or they might have exempted contracts then in force, but excluded from the provisions of the exempting clause any and all renewals or extensions of such existing contracts. But they did not see fit to do so, unless we can read into the statute an intention on the part of the legislature contrary to their expressed declaration. "It is presumed that the legislature understood [12] the meaning of the words used by them and that words are used in the common and ordinary meaning." (36 Cyc. 1135; *Hasely* v. *Ensley*, 40 Ind. App. 598, 82 N. E. 809; *Skinner* v. *Tibbitts*, 13 N. Y. Civ. Pro. 370; *Continental Hose Co.* v. *Fargo*, 17 N. D. 5, 114 N. W. 834; *United States* v. *Jarvis*, 26 Fed. Cas. No. 15,468; 2 Ware, 278.)

"The statute itself furnishes the best means for its own exposition, and if the sense in which words were intended to be used can be clearly ascertained from all its parts and provisions, a resort to extrinsic facts is not permitted." (36 Cyc. 1136, and cases cited.)

The intention of our legislature can only be ascertained from their clear and positive declaration contained in the Act as they wrote it: that "this [the Public Utility Act], however, does not have the effect of suspending, rescinding, invalidating or in any way affecting existing contracts." To hold, in the face of the plain and explicit provision of the statute, that its exemption does not extend to one of the substantial rights of one of the contracting parties, would not be interpreting the statute as we find it, but would be judicial legislation.

As the option to extend the contract was a substantial right which respondent could have enforced, in the absence of any

legislation invalidating the contract in whole or in part, and as the legislature did not attempt to "in any way" affect existing contracts, the contract in question was in full force and effect during the months of May, June and July, 1915.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

MR. JUSTICE HOLLOWAY: I dissent. In construing a statute, the courts are required to consider not alone the words employed, but as well the general purpose of the Act and the evils sought to be remedied. The purpose of the statute creating the Utilities Commission and defining its powers and duties was to bring the public utilities of the state under governmental control. The overshadowing evil to be remedied was the prevention of unjust discriminations in service and rates—to abolish all gratuitous rebates and special privileges. It was made unlawful for any public utility to charge a greater or less compensation for service than that established by the commission. With these declared purposes in view, it would seem to be a fair construction of section 12 to hold that the saving clause applies only to contracts then in force, and that it was never the intention of the legislature to extend immunity to renewals or extensions of such contracts.

WYLIE ET AL., RESPONDENTS, v. WYLIE PERMANENT CAMPING CO., APPELLANT.

(No. 4,047.)

(Submitted November 18, 1919. Decided January 14, 1920.)

[187 Pac. 279.]

Corporations—Stockholders—Sale of Stock—Goodwill.

Goodwill—Nature of Property.

1. Goodwill is an incident to and inherent in the business to which it attaches.

Corporations—Goodwill—Nature of Property.

2. The goodwill of a corporation is an intangible asset dependent on the corporate existence; it constitutes an element of value in connection with, but not apart from, the corporation and its business.

Same—Goodwill—Interest of Stockholder.

3. *Semble:* It would seem that a stockholder has no interest in the goodwill of his corporation which he can sell.

Same—Goodwill—Effect of Sale of Stock.

4. *Held,* under the above rules, that by the sale of his stock in a corporation a stockholder transferred to the buyer whatever corporate goodwill he possessed; hence he was not in position to maintain an action for breach of a contract under which he was to receive $1,500 for the goodwill of the business.

Appeal from District Court of Gallatin County; Ben B. Law, Judge.

ACTION by William W. Wylie and another against the Wylie Permanent Camping Company. Judgment for plaintiffs. Defendants appeal from it and an order overruling their motion for new trial. Reversal, with directions to dismiss the action.

Messrs. Day & Mapes, for Appellant, submitted a brief; *Mr. E. C. Day* argued the cause orally.

Mr. Thomas H. McKee, of the Bar of California, and *Mr. George Y. Patten* submitted a brief and argued the cause orally.

MR. JUSTICE COOPER delivered the opinion of the court.

This action arises out of the following agreement: "The following agreement between W. W. Wylie and the Wylie Permanent Camping Company, successors to the Wylie Camping

Company, Witnesseth: That W. W. Wylie hereby agrees to transfer to the new company his entire goodwill of the business as formerly conducted by him and promises not to go into the Yellowstone Park in business for himself hereafter. He further agrees to assist the company as newly organized so long as the company's business is conducted after the same or like manner as he conducted it, or while maintaining the Wylie spirit. In consideration for such services or any further service for the good of the company not herein mentioned, said Wylie is to receive ($1,500) Fifteen Hundred Dollars per annum payable semi-annually from January 1st, 1906, as long as mutually agreeable to the parties hereto signing.

"Witness our signatures to the above agreement, made at Helena, Montana, this 28th day of December, 1905.

"W. W. WYLIE.

"WYLIE PERMANENT CAMPING COMPANY,

"By A. L. SMITH, Secy."

The allegations of the complaint are: That William W. Wylie, from the year 1883 down to and including 1905, was engaged in conducting tourists' parties through the Yellowstone National Park by virtue of a license issued to him, from time to time, by the Interior Department of the federal government; that in the year 1896 he caused to be organized a corporation, named the Wylie Camping Company, sold to it all the equipment previously used by him in the conduct and maintenance of the business, and, during all of the years from 1896 to and including the year 1905, "remained in actual and personal management of the business," as he had prior to its organization; that later, in the summer of 1905, he sold and disposed of all of his shares of stock in that company to Harry W. Child, of Helena, and Arthur W. Miles, of Livingston; that thereafter a new corporation called the Wylie Permanent Camping Company was organized by Child and Miles, and all of its equipment was turned over to the new corporation; that defendant, in violation of its agreement, has failed and refused to pay plaintiff the installment of $750 due on July 1, 1908, and every other

installment due thereafter under its terms. The prayer is for judgment in the sum of $12,000, with interest at eight per cent per annum from the dates the several installments became due, and for costs.

The answer consists of general denials, and the affirmative allegation that the agreement in so far as it purported to be a sale of the goodwill of the business was without consideration and void. The new matter was denied by the replication, and upon the issues thus framed a trial was had with the aid of a jury and evidence adduced on behalf of plaintiffs.

W. W. Wylie was sworn on behalf of plaintiffs, his testimony tending to prove his conduct of the tourist and transportation business in the Yellowstone National Park from 1883 down to the time of the sale of his contract with the Wylie Camping Company and all his shares of stock in that company; he testified that he, together with his wife, attended to correspondence received by him from the time of the making of the contract as late as 1916; and encouraged tourists to go with the new corporation. He further states that he was not called upon to perform any services for the defendant after August, 1907, by any of its officers. He testified also that there was nothing said at the time of the sale of his contract and his stock in the old company concerning the transfer of his goodwill nor his license or "anything of the kind." He acknowledged receiving a letter of date August 29, 1907, from Mr. A. W. Miles, the president of the new company, in which it was stated that his services would no longer be needed, and inclosing check "for the months of July and August," and that on September 1, 1907, he replied thereto stating: "You will see by reading the contract for yearly salary that it was made for goodwill of business"; and protesting that he could "not be cut off in this abrupt manner."

At the close of plaintiff's testimony a motion for a nonsuit was overruled. The defendant refused to offer any testimony, contending that only questions of law were left for determination and that a verdict should be directed for either the plain-

tiffs or the defendant. In response to the court's direction, a verdict in the sum of $16,480 was returned by the jury, and judgment entered for that amount with interest. A motion for a new trial was overruled, and the case is here on appeal from the judgment and from the order denying defendant's motion for a new trial.

It is asserted by appellant that the contract is in violation of sections 5057 and 5058 of the Revised Codes and, therefore, void; that W. W. Wylie had no vendible interest to sell and hence that the instrument sued on was void for lack of consideration; that, being terminable at the will of either party, it was, by the letter of August 27, 1907, from the president of defendant corporation to W. W. Wylie, ended; that the action is barred by the statute of limitations, and that the evidence is insufficient to sustain the judgment.

In the determination of this appeal, our decision will be made to rest upon the principle that where a stockholder sells his stock, the goodwill of the business goes with it, leaving nothing tangible or of substance upon which to found another consideration touching any part of the same subject matter. If that be so, all the other questions of law and fact here presented are subordinate to, and controlled completely by, that issue.

It may be conceded, as respondent insists, that the goodwill of a business is the expectation of continued patronage (Rev. Codes, sec. 4566); is property subject to ownership and capable of being transferred (sec. 4567); and that one who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified territory, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein (sec. 5058); but still, the respondent, having theretofore at the same time and in the same transaction sold "the contract" as well as his "shares of stock in the old corporation," he separated himself from, and parted with, the goodwill and delivered himself of all he had to transfer. Goodwill is not a thing apart, but an incident to, and inherent in the thing itself—the business. That Mr. Wylie

had but one thought concerning the disposal of the goodwill is cleared of doubt by the statement in his letter of September 1, wherein he states: "You will see by reading the contract for yearly salary that it was made for goodwill of business"; and his oral testimony upon the trial, giving expression to the same thought in the following language: "I asked Mr. Child what he expected of me in the nature of duties. He said repeatedly, 'I expect no services from you; I do not care if you don't turn a hand over—if you and Mrs. Wylie would like to go up and ride around the Park once in a while, we would be glad to have you do it; but otherwise, all that we want is your goodwill and that you stay out of the business—' that is the object of this writing. At the close of the conversation I took my copy of the contract and left. * * * But my understanding all the time of the value they were getting was for me keeping out of the Park and for the goodwill and use they were making of my name. * * * Q. The services which you rendered in forwarding these letters to people telling or suggesting to them how they should go or how to arrange parties and things of that kind—those services were comparatively insignificant? A. Not insignificant, but not what I bring this suit for. Q. You don't mean to tell this jury that your services in forwarding letters and recommending people to visit Yellowstone Park, by the Wylie way, is worth $1,500 a year, do you? A. Hardly that."

This testimony plainly indicates that the sale of the goodwill alone was regarded by him as the essential element of the contract sued on.

"'Goodwill' can only exist in connection with an existing [1, 2] and growing business, and, when applied to a corporation, is only an intangible asset dependent on the corporate existence and is appurtenant to the corporation as such, has no independent existence, and constitutes an element of value in connection with, but not apart from, the corporation and its business." (*In re Stevens*, 46 Misc. Rep. 623, 95 N. Y. Supp. 297, 313.)

In *Menendez* v. *Holt*, 128 U. S. 514, 521, 522, 32 L. Ed. 526, 9 Sup. Ct. Rep. 143, Mr. Chief Justice Fuller, speaking of the definition of "goodwill," has this to say: "Goodwill was defined by Lord Eldon, in *Cruttwell* v. *Lye*, 17 Ves. Jr. 335, 346, 34 Eng. Reprint, 129, to be 'nothing more than the probability that the old customers will resort to the old place'; but Vice-Chancellor Wood, in *Churton* v. *Douglas*, Johns. V. C. 174, 188, 70 Eng. Reprint, 385, 391, says it would be taking too narrow a view of what is there laid down by Lord Eldon to confine it to that; but that it must mean every positive advantage that has been acquired by the old firm in the progress of its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business. It may be that where a firm is dissolved and ceases to exist under the old name, each of the former partners would be allowed to obtain 'his share' in the goodwill, so far as that might consist in the use of trademarks, by continuing such use in the absence of stipulation to the contrary; but when a partner retires from a firm, assenting to or acquiescing in the retention by the other partners of possession of the old place of business and the future conduct of the business by them under the old name, the goodwill remains with the latter as of course."

In the later case of *Metropolitan Nat. Bank* v. *St. Louis Dispatch Co.*, 149 U. S. 436, 446, 37 L. Ed. 799, 13 Sup. Ct. Rep. 944, Chief Justice Fuller further says upon the same subject: "It is tangible only as an incident, as connected with a going concern or business having locality or name, and is not susceptible of being disposed of independently."

Mr. Lindley in his work on Partnership, Volume 2, page 439, says: "It is plain that goodwill has no meaning except in connection with a continuing business." (See, also, Story on Partnership, par. 99; Parsons on Partnership, 4th ed., sec. 181.)

The court of appeals of the District of Columbia, in *Mayer Fertilizer etc. Co.* v. *Virginia etc. Co.*, 35 App. Cas. (D. C.) 425, 426, in speaking on this same subject, states that: "Good-

will, like a trademark, is but an incident to, and can have no existence apart from, the business in which it had its origin. * * * In this case, the Southern Fertilizing Company wound up its affairs and abandoned its business. Necessarily, its goodwill became extinct. There was nothing tangible to which it might attach. What is included under the term 'goodwill' varies almost in every case, but it is a matter distinctly appreciable, which may be preserved (at least, to some extent) if the business be sold as a going concern, but which is wholly lost if the concern is wound up, its liabilities discharged and its assets got in and distributed. (*Wedderburn* v. *Wedderburn*, 22 Beav. 84, 52 Eng. Reprint, 1039.)"

The law, as laid down in 12 R. C. L., paragraph 9, page 985, is that "Where a contract for the sale and transfer of a business omits to mention the goodwill, the presumption is that it was the intention of the parties that the goodwill should pass with the other assets. This necessarily results from the fact that the goodwill cannot exist except in connection with the business." (See, also, 20 Cyc. 1275–1282, title "Goodwill"; Am. & Eng. Ency. of Law, title "Goodwill," 1085–1092.)

It seems, too, to be the law, that a stockholder in a corpora-
[3] tion has no interest in the goodwill of the corporation, which he can sell. (12 R. C. L., p. 983.) This seems to be the holding of the supreme court of California, in *Merchants' Ad-Sign Co.* v. *Sterling*, 124 Cal. 429, 71 Am. St. Rep. 94, 46 L. R. A. 142, 57 Pac. 468; *Dodge Stationery Co.* v. *Dodge*, 145 Cal. 380, 78 Pac. 879, construing Code sections of that state identical with our sections 5057 and 5058, Revised Codes.

For these reasons, the conclusion must be that whatever of goodwill W. W. Wylie possessed was incidental to the corporate
[4] business and accompanied the transfer to Messrs. Child and Miles of his contract with, and his stock in, the Wylie Camping Company. Upon this ground alone the action loses its foundation and must fail.

Counsel, however, insists that, having accepted the services of Mr. Wylie, appellant cannot now escape liability for the ser-

vices rendered. This contention sets at naught his positive declaration in the letter of September 1, 1907, addressed to Mr. Miles, that "the contract for yearly salary was made for goodwill of the business," as well as his emphatic statement upon the witness-stand that the services rendered were "*not what I bring this suit for.*" Whether his procrastination for a period of more than eight years in seeking redress is an additional reason why the judgment cannot stand need not now be determined.

The judgment of the district court, under a contract uncertain in terms and indefinite in duration, imposes upon appellant an obligation to pay respondent $1,500 per annum until such time as Mr. Wylie should consent to his own discharge. The imposition of that burden upon appellant, we are satisfied after a careful review of the whole case, was as far from the contemplation of the parties at the time of the making of the contract as it is without the purview of the law upon the subject.

The judgment and order are reversed, with directions to dismiss the action.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and MATTHEWS concur.

Rehearing denied March 3, 1920.

STATE, RESPONDENT, v. KELLY ET AL., DEFENDANTS; HOWARD, APPELLANT.

(No. 4,509.)

(Submitted January 12, 1920. Decided January 30, 1920.)

[187 Pac. 637.]

Intoxicating Liquors — Search and Seizure Statute — Confiscation—Nature of Proceeding—New Trial—Constitution—Jury Trial—Costs.

Intoxicating Liquors—Confiscation—New Trial.

1. The search and seizure statute (Prohibition Enforcement Act, Chap. 143, Laws 1917), not making provision for a new trial, and the general statutes covering new trials being inapplicable, the unsuccessful claimant of seized liquors was not entitled to a new trial.

Same—Seizure—Question Determinable.

2. The question for determination in a proceeding under Chapter 143, Laws of 1917, is whether any of the articles seized were used, kept or possessed by any person with the intention of violating the prohibitory liquor law.

Same—Search and Seizure Statute—Nature of Judgment.

3. Anyone making the required claim of ownership to seized liquors becomes a party to the proceeding instituted under Chapter 143, Laws of 1917, to the extent that he may appeal from a judgment of forfeiture, the determination by the court not, however, being in any sense an adjudication of title as between conflicting claimants.

Same—Nature of Proceeding.

4. The proceeding instituted under the search and seizure statute is one *in rem* against the seized liquors for their condemnation as forfeited property, is of purely statutory origin and summary in character.

Constitution—Jury Trial—Power of Legislature.

5. The right of trial by jury in the classes of cases in which it existed at the time the state Constitution was adopted remains inviolate and is secured to all; in all other cases the legislature may provide for a trial or hearing without a jury.

Intoxicating Liquors—Confiscation—Jury Trial.

6. The party claiming liquors seized under the provisions of Chapter 143, Laws of 1917, is not entitled to trial by jury.

Same—Costs—How Paid.

7. *Held*, that since Chapter 143, above, does not provide that the costs of the proceeding incident to the seizure of contraband liquors may be taxed against the party claiming them, it is error to so tax them.

Same—Costs—How Paid.

8. *Held*, under section 13 of Chapter 143, Laws of 1917, that if costs are recoverable in a proceeding of the nature of the above, they must be paid by the county from the sale of the property seized, provided any of such property is of the character which may be sold.

Appeal from District Court of Silver Bow County; John V. Dwyer, Judge.

PROCEEDING under the Search and Seizure Act, Chapter 143, Laws of 1917, instituted by the state against John D. Kelly, *et al.*, and certain intoxicating liquors. From the judgment and an order denying her a new trial, claimant Lucille Howard appeals. Judgment modified and affirmed. Appeal from order dismissed.

Messrs. Walker & Walker and *Mr. C. S. Wagner*, for Appellant, submitted a brief; *Mr. Thos. J. Walker* and *Mr. Wagner* argued the cause orally.

The court erred in denying appellant's motion to tax costs. "The right to costs and the liability therefor depends upon the provisions of the statute under which such a proceeding is brought." (*Nichols* v. *Polk County*, 78 Iowa, 137, 42 N. W. 627; *Garrett* v. *Polk County*, 78 Iowa, 108, 42 N. W. 618; *Byram* v. *Polk County*, 76 Iowa, 75, 40 N. W. 102; *Commonwealth* v. *Certain Intoxicating Liquors*, 14 Gray (Mass.), 375; *Fay* v. *Barber*, 72 Vt. 55, 47 Atl. 180; 23 Cyc. 301; 15 C. J. 54.)

As to the sufficiency of complaints generally in actions of this kind, see the following authorities: "Warrant should not be issued on suspicion but statute should be supported by reasonable interpretation of moving papers." (*Matter of Geschwinder*, 68 Misc. Rep. 97, 124 N. Y. Supp. 939.) "Complaint should allege every material fact necessary to constitute offense." (*Myers* v. *State*, 47 Tex. Civ. App. 336, 105 S. W. 48; *State* v. *Dondis* 111 Me. 17, 87 Atl. 478; 23 Cyc. 294.) Necessary to follow language of statute at least substantially. (*Livelar Co.* v. *State*, 98 Miss. 330, 53 South. 681.)

When, as in this case, the witnesses for the state act as "go-betweens," they are regarded as accomplices, and their uncorroborated testimony is held, as being insufficient to sustain a conviction for illegal liquor selling. (*Moore* v. *State*, 14 Okl. Cr. 292, 170 Pac. 519; *Buchanan* v. *State*, 4 Okl. Cr. 645, 36 L. R. A. (n. s.) 83, 84 and note, 112 Pac. 32; *Reed* v. *State*, 3 Okl. Cr. 16, 24 L. R. A. (n. s.) 268 and note, 118 Pac. 1070; *State* v. *Wakely*, 43 Mont. 427, 117 Pac. 95.)

In Oklahoma, as in this state, the law confines its penalties to the seller to him who gives away, furnishes, *etc.*, and leaves the purchaser or the recipient immune to the penalties of the law, yet when he who purchases or receives, aids, abets or assists or induces the accused to part with liquor, then under the authorities he is an accomplice. (*Kendrick* v. *State*, 11 Okl. Cr. 380, 146 Pac. 727; *Sessions* v. *State*, 6 Ga. App. 336, 64 S. E. 1101, and cases in note, 24 L. R. A. (n. s.) 268.)

The authorities holding that in proceedings of this kind a claimant is not entitled to a trial by jury as a matter of right proceed upon the theory that unless the right of trial by jury is specifically granted by statute, it does not exist. We contend that the basis for these decisions is wholly erroneous, and that the true doctrine is that unless the statute in terms denies the right, it does exist. (See *Bogan* v. *State*, 56 Okl. 367, 156 Pac. 233.)

Prior to December 31, 1918, intoxicating liquor was property in this state, and was entitled to all the protection the law affords for any other kind or character of property, real, personal or mixed, and it has not lost its character as property by virtue of the prohibitory legislation affecting it. It becomes contraband only when used or disposed of contrary to law. It is immaterial what quantity a man may have in his possession, whether a bottle, or a warehouse full, so long as the prohibition laws are not violated by the owner thereof, as liquor has all the attributes of any other kind or character of property, and he cannot be deprived thereof without due process of law. (*Wynehamer* v. *People*, 13 N. Y. 378.)

We contend that "due process of law," in this state involving property rights and triable in the courts of common law, contemplates, involves and gives to the accused the inherent and inalienable right of trial by jury. (*Colon* v. *Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302.) This court has held that the right of trial by jury guaranteed by our Constitution is the same as that guaranteed by the federal Constitution. (*Consolidated Gold etc. Min. Co.* v. *Struthers*, 41 Mont. 565,

111 Pac. 152.) The United States supreme and federal courts have held that in actions or proceedings of this character, the right of trial by jury is guaranteed, except where the violation of the excise laws occurs on the high seas. (*Garnharts* v. *United States*, 16 Wall. (U. S.) 162, 21 L. Ed. 275; *Modern Loan Co.* v. *Police Court*, 12 Cal. App. 582, 108 Pac. 56.)

Mr. S. C. Ford, Attorney General, and *Mr. N. A. Rotering*, for Respondent.

Proceedings to forfeit intoxicating liquors are special proceedings. Costs are allowed to the prevailing party in special proceedings. (*State* v. *Second Judicial District Court*, 24 Mont. 425, 426, 62 Pac. 688. See, also, *Farley* v. *Sixteen Bottles of Champagne*, 153 App. Div. 502, 138 N. Y. Supp. 276.)

Under section 8 of the Prohibitory Enforcement Act, the claimant must show that the liquors were not in any manner kept or possessed with the intention of violating any of the prohibition laws of this state. We claim that under this provision it is sufficient to charge and prove that the liquors were being kept and intended for sale in violation of law, and that it is not necessary to charge or prove that any sale was made in violation of law. (*Commonwealth* v. *Intoxicating Liquors*, 142 Mass. 470, 8 N. E. 421; *State* v. *Howley* (Me.), 9 Atl. 620; *State* v. *Blair*, 72 Iowa, 591, 34 N. W. 432; *State* v. *Schoppe*, 113 Me. 10, 92 Atl. 867; *Campbell* v. *State*, 171 Ind. 702, 87 N. E. 212; *State* v. *Martin*, 92 Wash. 366, 159 Pac. 88.)

In a proceeding for forfeiture of intoxicating liquors, evidence that the claimant kept a saloon is competent upon the question whether he intended the liquors for illegal sale. (*Commonwealth* v. *Certain Intoxicating Liquors*, 107 Mass. 386.) Where liquors are kept in a dwelling-house, it is not necessary to prove that sales were intended to be made in the dwelling-house. It is sufficient to show that it was in effect a magazine or warehouse, where liquors were stored which were intended to be sold at a saloon. (*Commonwealth* v. *Certain Intoxicating Liquors*, 116 Mass. 24.)

It has been held by the court of appeals of Kentucky, in a criminal case, that to complete the offense of violation of the prohibition law, it is not necessary that the accused shall actually make a sale, and that it is sufficient that he has the liquor in his possession with that intent. The court further held that the gist of the offense is the intent, and that the jury might take into consideration all of the circumstances to determine that fact. (*Combs* v. *Commonwealth*, 162 Ky. 86, 172 S. W. 101; *Peters* v. *Commonwealth*, 154 Ky. 689, 159 S. W. 531; *King* v. *Commonwealth*, 143 Ky. 125, 136 S. W. 147, 149.)

It would appear that a proceeding *in rem* is an action in equity, and, being such, neither party is entitled to a trial by jury, as a jury is not guaranteed in an equity action by the Constitution, the test in all such cases being, at the time of the adoption of the Constitution, "Was either party entitled to a trial by jury?" In this state neither party was entitled, as a matter of right, to a trial by jury in an equitable action. (*Kite* v. *People*, 32 Colo. 5, 74 Pac. 886, 888; *Kirkland* v. *State*, 72 Ark. 171, 105 Am. St. Rep. 25, 2 Ann. Cas. 242, 65 L. R. A. 76, 78 S. W. 770; *Furth* v. *State*, 72 Ark. 161, 78 S. W. 759; *Frost* v. *People*, 193 Ill. 635, 86 Am. St. Rep. 352, 61 N. E. 1054.) In the case of *Campbell* v. *State*, 171 Ind. 702, 87 N. E. 212, 214, the court enters into a discussion whether the procedure prescribed in the Prohibition Act of Indiana was not against the due process of law feature of the federal Constitution. It discusses this matter and concludes that it was not. (23 Cyc. 300; *State* v. *Intoxicating Liquors*, 82 Vt. 287, 73 Atl. 586; *Steward* v. *State*, 180 Ind. 397, 103 N. E. 316; *Sothman* v. *State*, 66 Neb. 302, 92 N. W. 303.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On April 12, 1919, John P. Murphy made complaint to the district court of Silver Bow county that he had reason to believe, and did believe, that intoxicating liquors were being kept, possessed and deposited at the Almira Apartments, in Butte,

with the intention that such liquors should be sold, exchanged, given away or otherwise disposed of in violation of the laws of the state of Montana. The complaint named as defendants, John Doe Kelly, afterwards identified as Joe D. Kelly; Richard Roe, thereafter identified as R. P. Dickerson; Jennie Doe, thereafter identified as Lucille Howard, and certain intoxicating liquors. A search-warrant was issued, the premises searched and a large amount of intoxicating liquors and other property seized. After the return of the warrant, Miss Howard made claim to substantially all of the liquors, and Kelly and Dickerson each made claim to a portion of them. Upon the hearing, claimant Howard demanded a jury trial, which was denied, and from the judgment forfeiting the liquors and ordering them destroyed and from an order denying her a new trial, she appealed. These questions are presented:

1. The right of a party claiming the property seized to a trial by jury.

2. The sufficiency of the evidence to justify the judgment of confiscation.

3. The right of the state to tax the costs against the party claiming the property; and

4. A preliminary question of practice, *viz.:* The right of a party claiming the property to move for a new trial.

1. New trial proceedings are purely statutory. (*Ogle* v. *Potter*, 24 Mont. 501, 62 Pac. 920.) The search and seizure statute [1] (Prohibition Enforcement Act, Chap. 143, Laws of 1917) makes no provision for a new trial. The general statute governing new trials has to do only with the re-examination of issues of fact arising upon formal pleadings (*State ex rel. Culbertson Ferry Co.* v. *District Court*, 49 Mont. 595, 144 Pac. 159), and from the very nature of it, cannot have application to a proceeding of this character. The attempted appeal from the order denying a new trial is dismissed.

2. The proceeding authorized by Chapter 143, above, is instituted by a sworn complaint (section 7), but this does not mean necessarily a formal pleading. It may be in the form of an

affidavit (section 8). Upon the hearing the question for deter-
[2] mination is: Were the articles seized or any of them used, kept or possessed by any person with the intention of violating the prohibitory liquor law (section 8). At such hearing, any person claiming an interest in any of the property seized may appear and be heard upon filing a verified claim setting forth particularly the character and extent of his interest. The statute does not require or contemplate that any person shall be made defendant either in the complaint (section 7) or in the search-warrant (section 9682, Rev. Codes). The right of a party to be heard in opposition to the condemnation does not depend upon the fact that he is named a defendant but solely upon the fact that he presents a verified claim. This proceeding is altogether distinct from the abatement proceeding and criminal prosecution for violation of the liquor laws. From the time of the seizure until final judgment, the liquors are in the custody of the law (section 10, 23 Cyc. 298). If the evidence warrants the conclusion that they are contraband, they are subject to forfeiture, and the question of ownership is altogether immaterial. If, however, the court determines that the liquors were not kept with intention to violate the law, the state has then no further interest, except the right of appeal, and no further right to retain possession. It follows that it is not until the court has first determined that the liquors are not contraband that the question of ownership arises, and it arises then only to the extent that a determination becomes necessary to enable the court to say *prima facie* to whom it will deliver pos-
[3] session. Anyone who makes the required claim of ownership becomes a party to the proceeding to the extent that he may appeal from a judgment of forfeiture, but the determination by the court is not in any sense an adjudication of title as between conflicting claimants, and this is all that was meant by the language employed in *State ex rel. Prato* v. *District Court*, 55 Mont. 560, 179 Pac. 497. These observations are intended to emphasize the character of the proceeding authorized
[4] by Chapter 143. It is a proceeding *in rem* against the

liquors themselves for their condemnation as forfeited property. It is purely of statutory origin, is civil in nature (section 37), and summary in character. (*State ex rel. Prato* v. *District Court*, above; 23 Cyc. 299.)

The right of trial by jury in the classes of cases in which it [5] was enjoyed at the time our Constitution was adopted remains inviolate, and is secured to all by section 23, Article III. In all other cases the legislature may provide for a trial or hearing without a jury. (*Finch* v. *Kent*, 24 Mont. 268, 61 Pac. 653.)

Such summary proceedings as were known to the common law [6] were not triable by jury as a matter of right. (4 Bl. Com. 280.) Summary proceedings of this character authorized by the state in the exercise of its police power and designed to effectually suppress the unlawful traffic in intoxicating liquors were unknown to the common law or to the statutory laws of this territory at the time our Constitution was adopted, and are not comprehended in the guaranty of trial by jury. Upon this question there is some diversity of opinion, but the decided weight of authority and the better reasoning support the view herein indicated. (*Frost* v. *People*, 193 Ill. 635, 86 Am. St. Rep. 352, 61 N. E. 1054; *Kite* v. *People*, 32 Colo. 5, 74 Pac. 886; *Campbell* v. *State*, 171 Ind. 702, 87 N. E. 212; *Kirkland* v. *State*, 72 Ark. 171, 105 Am. St. Rep. 25, 2 Ann. Cas. 242, 65 L. R. A. 76, 78 S. W. 770; *State* v. *Intoxicating Liquor*, 82 Vt. 287, 73 Atl. 586; 15 R. C. L. 412; 16 R. C. L. 216; 23 Cyc. 300.)

Cases cited by appellant within the admiralty and maritime jurisdiction of the federal courts and cases arising under the revenue laws of the United States are not applicable.

It would not be questioned by anyone that if the forfeiture of the liquors were a part of the penalty imposed upon a defendant for a violation of the law, the right of trial by jury would obtain; but, as observed heretofore, this proceeding is *in rem*, entirely distinct from, and independent of, the criminal prosecution and having different objects and results in view. The proceeding is more analogous to that provided by the Act

of Congress approved February 25, 1885, and considered in *Cameron* v. *United States*, 148 U. S. 301, 304, 37 L. Ed. 459, 13 Sup. Ct. Rep. 595 [see, also, Rose's U. S. Notes].

The legislation in question does not transgress the Constitution in providing that intoxicating liquors may be forfeited and destroyed after a summary hearing by the court and a determination of their contraband character.

3. It is earnestly contended that the evidence is insufficient to sustain the judgment. We have examined it carefully, but no useful purpose would be served in reviewing it at length. We content ourselves with saying that in our judgment it is ample. The most that can be said of it is that it presents a sharp conflict involving only the credibility of the witnesses.

4. In taxing the cost of the proceeding against claimant [7] Howard the trial court erred. Chapter 143 does not provide that cost may be taxed against a party claiming the property. The reference in section 11 is to the costs which may be imposed in a criminal prosecution for a violation of the liquor laws. Costs, whenever recoverable, become a part of the judgment (*Spencer* v. *Mungus*, 28 Mont. 357, 72 Pac. 663), and the only judgment authorized by section 8 is a judgment of forfeiture, which orders the offending property destroyed; in other words, it is a judgment *in rem* and does not run against any person. Section 8, however, provides that if any of the condemned property is ordered sold, "the proceeds of such sale *after the payment of all costs of such proceeding* shall be paid [8] into the common school fund, *etc.*" Section 13 determines the amount of fees allowed to officers and witnesses, and provides "such fees shall be certified to the board of county commissioners by the county attorney or attorney general *and paid by the county, etc.*" These provisions, we think, sufficiently indicate the legislative intention that the costs incurred in the district court are recoverable, if at all, from the sale of the property seized, provided any of such property is of the character which may be sold.

The cause is remanded to the district court, with directions to strike from the judgment the item of cost, and as thus modified, it will stand affirmed.

Modified and affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

Rehearing denied March 1, 1920.

STATE, APPELLANT, v. MALARKY, RESPONDENT.

(No. 4,408.)

(Submitted January 12, 1920. Decided January 30, 1920.)

[187 Pac. 635.]

Intoxicating Liquors—Searches and Seizures—Search-warrant—Fatal Variance—Dismissal.

Intoxicating Liquors — Confiscation — Search-warrant — Complaint — Fatal Variance—Dismissal.

1. Where the complaint in proceedings under the Search and Seizure Act (Chap. 143, Laws 1917) alleged that defendant had contraband liquors deposited at No. 601 of a certain street, and a search-warrant was issued to search such premises, and the officer searched the premises at No. 603 on that street, seizing, among other things, a small amount of liquor, the departure was fatal to the validity of the proceedings, and a judgment of dismissal was proper.

Search-warrant—Strict Construction.

2. The authority of an officer conferred by a search-warrant is not to be extended by construction to any case not clearly covered by the statute.

Appeal from District Court of Silver Bow County; John V. Dwyer, Judge.

PROCEEDING by the State against Andrew T. Malarky and certain intoxicating liquors, under the Enforcement Act (Chap. 143, Laws 1917). Judgment for defendant. The state appeals. Affirmed.

Mr. S. C. Ford, Attorney General, *Mr. Frank Woody,* Assistant Attorney General, and *Mr. Jos. R. Jackson, Mr. N. A. Rotering, Mr. A. C. McDaniel* and *Mr. F. L. Riley,* for the State, filed a brief; *Mr. Riley* argued the cause orally.

All the law requires is that a sufficient description be given in a search-warrant, so that the premises desired to be searched may be identified and located. It is held in *Milwaukee Beer Co.* v. *State,* 55 Okl. 181, 155 Pac. 200: "We are of opinion that this particular statute should receive a somewhat broader and more liberal construction than the statutes in reference to common-law search-warrants." (See, also, *State* v. *Markuson,* 7 N. D. 155, 73 N. W. 82; *Gullatt* v. *State* (Ala.), 74 South. 970; *State* v. *Minnehan,* 83 Me. 310, 22 Atl. 177; *Rose* v. *State,* 171 Ind. 662, 17 Ann. Cas. 228, 87 N. E. 103; *State* v. *Moore,* 125 Iowa, 749, 101 N. W. 732; *State* v. *Robinson,* 49 Me. 285; *Commonwealth* v. *Certain Intoxicating Liquors,* 122 Mass. 36; *McSherry* v. *Heimer,* 132 Minn. 260, 156 N. W. 130; *State* v. *Nejin,* 140 La. 793, 74 South. 103.)

It has been held by some courts that the presence of intoxicating liquors in court will correct any defect in the search-warrant, the position being that the liquor being contraband and outlawed, it matters not how it may be brought into court. This is the position of the supreme court of Alabama in the case of *Hemmelweit* v. *State* (Ala.), 75 South. 961. (*Ferguson* v. *Josey,* 70 Ark. 94, 66 S. W. 345; *O'Neal* v. *Parker,* 83 Ark. 133, 103 S. W. 165.)

Mr. William Meyer, for Respondent, submitted a brief and made oral argument.

Counsel contend that the presence of intoxicating liquors in court will correct any defect in the search-warrant and cite the cases of *Hemmelweit* v. *State* (Ala.), 75 South. 961, *Ferguson* v. *Josey,* 70 Ark. 94, 66 S. W. 345, and *O'Neal* v. *Parker,* 83 Ark. 133, 103 S. W. 165, as authority for this statement. In the first case, under the law of Alabama, the possession of intoxicating liquors was unlawful. That is not true in this state.

The *Ferguson* v. *Josey Case* and the *O'Neal Case,* were decided under statutes entirely different from the statutes in this state, and the question involved was a different one from the question here presented to the court.

The purpose of a search-warrant is, of course, to examine one's premises or persons with a view to the discovery of stolen, contraband or illicit property, but recognizing the fact that the purpose of it could very easily be violated, both the federal Constitution by the fourth amendment and our state Constitution, Article III, section 7, provided certain limitations upon the right of a search-warrant. It has been well said: "The security intended to be guaranteed by the provisions against wrongful search and seizure is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give remedy against such usurpations when attempted." (24 R. C. L. 703, sec. 5; *Larthet* v. *Forgay,* 2 La. Ann. 524, 46 Am. Dec. 554; 23 Cyc. 297, 300.)

"The search-warrant must contain a description of the premises to be searched so specific and accurate as to avoid any unnecessary or unauthorized invasion of the right of privacy. To this end it should identify the property in such a manner as to leave the officer no doubt and no discretion as to the premises to be searched." (23 Cyc. 297 (D).) "The proceedings will be invalidated by any substantial variance between the complaint and the warrant as for instance, in the description of the premises to be searched." (23 Cyc. 297 (E).)

MR. JUSTICE COOPER delivered the opinion of the court.

The provisions of Chapter 143, Laws of 1917, page 239, commonly known as the Enforcement Act, furnish the basis for this proceeding. Section 7 thereof authorizes the court, upon a proper showing, to issue a search-warrant directing the seizure of all intoxicating liquors found within the building or premises therein described.

The facts are these: On the thirty-first day of January, 1919, as a foundation for a search-warrant, a complaint was sworn [1] to and filed by one of the prosecuting officers of Silver Bow county, alleging that there was probable cause to believe that Andrew T. Malarky was possessed of and had deposited "in that certain building situate at and numbered 601 North Main Street, Butte, Silver Bow County, Montana," intoxicating liquors, which Malarky intended for sale, exchange, gift, barter or other disposition in violation of law, and praying that a warrant issue for a search of the premises and the seizure of such intoxicating liquors, together with the vessels containing the same and all implements, furniture and other articles used or kept in connection with its sale. In compliance therewith a search-warrant was issued by the district court containing a true copy of the complaint, commanding any peace officer of that county, with the necessary and proper assistants, to thoroughly search the premises described in the complaint, and to seize any intoxicating liquors found therein, together with the vessels containing the same and all implements, furniture, fixtures and other articles used in connection therewith. In compliance with the warrant, as shown by the return thereon, John F. Melia, a deputy constable for South Butte township, at No. 603 North Main Street in the city of Butte, seized a quantity of candy, tobacco, cigars, soft drinks, three empty demijohns with a trace of whisky therein, and one bottle containing four ounces and another six ounces of whisky. Thereafter Andrew T. Malarky filed a paper claiming the property as his own, demanding its return and declaring that none of the articles were used or intended to be used with intent to violate any of the prohibition laws of the state of Montana. The cause was tried by the court and at the close of the testimony in behalf of the state the court dismissed the proceeding and directed the return of the property to the claimant. The appeal is from the judgment.

As stated above, the search-warrant contains a copy of the complaint and commands the officer to thoroughly search the premises described in the complaint.

Error by the trial court is urged in granting the motion; in dismissing the action and in sustaining the following motion of claimant to strike: "We (counsel for claimant) move to strike out all the testimony of this witness with reference to the search-warrant dated February 4, 1919, introduced in this case as an exhibit, for the reason that it appears from the testimony of this witness that that property was seized in a building described and numbered as 603 North Main Street, Butte, Montana."

The sole question for decision is whether the premises searched and in which the property described in the officer's return was found were the same premises described in the complaint and search-warrant. The district court granted the motion to dismiss and gave judgment against the state upon the ground of variance between the search-warrant and the proof. The officer to whom the search-warrant was delivered and to whom directions were given to search "that certain building situate at and numbered 601 North Main Street, Butte," upon the trial, testified: "There is no 601 North Main Street. * * * The only number I saw on the building was 603. * * * I entered the building on Woolman Street. There are three entrances from the outside that I know of to the building."

Assuming, as we are bound to do under the settled rule of this court, that all the evidence tending to prove plaintiff's case is true, it is apparent that the proof failed to establish the fact that the premises actually searched were the premises described in the search-warrant. As was observed in *State* v. *Guthrie*, 90 Me. 448, 38 Atl. 368, a search-warrant "is a sharp and heavy police weapon to be used carefully lest it wound the security or liberty of the citizen." In *State ex rel. Streit* v. *Justice Court*, 45 Mont. 375, 48 L. R. A. (n. s.) 156, 123 Pac. 405, it is said: "The search-warrant was not known to the early common law. It grew up by 'imperceptible practice' and was first confined to the case of stolen goods. Its legality was denied by Lord Coke. (*Entick* v. *Carrington*, 19 How. St. Tr. 1030.) The use of it was subsequently extended. (2 Chitty's General Practice, p. 180.) Because it is a process subject to much abuse,

it has in this country generally been limited in its use by constitutional restrictions. (Const., sec. 7, Art. III; *Robinson* v. *Richardson*, 13 Gray (Mass.), 454.)"

A clear elaboration of the forms to be observed in proceeding under this act will be found in the opinion of the Chief Justice in the very recent case of *State ex rel. Prato* v. *District Court*, 55 Mont. 560, 179 Pac. 479.

The authority of a searching officer, susceptible as it is of [2] great abuse, and affecting the very essence of personal security, is not to be extended by construction to any case not clearly covered by the statute. (*State ex rel. Streit* v. *Justice Court, supra.*) In the view of the trial court, the departure was fatal to the validity of the proceedings, and in this we agree.

The judgment appealed from is therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and MATTHEWS concur.

STATE, RESPONDENT, v. NIELSEN, APPELLANT.

(No. 4,431.)

(Submitted January 12, 1920. Decided January 30, 1920.)

[187 Pac. 639.]

Intoxicating Liquors—Enforcement Act—Issues—Trial—Prima Facie Case—Burden of Proof—Evidence—Sufficiency.

Intoxicating Liquors—Enforcement Act—Issues—Trial.

1. The question primarily involved in a proceeding under the Prohibitory Enforcement Act, Chap. 143, Laws 1917, is whether or not the liquors seized as contraband were kept or possessed by any person with the intention of violating the prohibition laws of the state, the question of their ownership being merely incidental.

Same—Searches and Seizures—*Prima Facie* Case—Burden of Proof.

2. In proceedings of the nature of the above, the affidavit upon which the search-warrant is issued and the possession of the liquors at the

time of their seizure are *prima facie* evidence of their contraband character, the burden then resting upon the claimant to show his property right and interest therein and that they were not used, kept or possessed with the intention of violating the prohibition laws.

Trial—*Prima Facie* Case—Contradictory Testimony—Effect.

3. Where a *prima facie* case has been made, contradictory testimony does not necessarily overcome it, but may amount to a mere conflict in the evidence, the ultimate facts to be determined by court or jury.

Intoxicating Liquors—Destruction—Evidence—Sufficiency.

4. The purchase of liquor costing $980 by one living in a single room at a hotel, the liquor being in pint bottles and stored in a closet packed in gunny-sacks, filling the closet almost to the ceiling, with scarcely room for wearing apparel, with other facts and circumstances, *held* sufficient to justify the court in disregarding the claimant's testimony and ordering the liquor destroyed.

Appeal from District Court of Silver Bow County; John V. Dwyer, Judge.

PROCEEDINGS by the State, under the Prohibition Enforcement Act, against George Nielsen and certain intoxicating liquors. From the judgment ordering the seized liquors destroyed, and from an order denying her a new trial, Edith Nielsen appeals. Judgment affirmed and appeal from order dismissed.

Mr. William Meyer, for Appellant, submitted a brief and argued the cause orally.

It was contended in the trial court that the possession by the claimant of so much whisky as was here involved should be considered as evidence that it was being held for an illegal purpose. No such presumption attaches under our law. A person is entitled to have in their possession as much liquor as they can afford or feel they could afford to purchase, provided, the same was purchased prior to the thirty-first day of December. 1918. This being true, does the possession of a large quantity of liquor irrespective of the prohibition laws of this state carry with it any presumption that it is intended to be used to violate said laws? Under the authorities, we submit no such presumption attaches. (*Johnson* v. *State*, 6 Okl. Cr. 490, 119 Pac. 1019;

McComb City v. *Hill*, 100 Miss. 193, 39 L. R. A. (n. s.) 534, 56 South. 346; *Noble* v. *People* (Colo.), 177 Pac. 970.)

Mr. S. C. Ford, Attorney General, *Mr. Frank Woody*, Assistant Attorney General, *Mr. Jos. R. Jackson*, *Mr. N. A. Rotering*, *Mr. F. L. Riley* and *Mr. A. C. McDaniel*, for Respondent, submitted a brief; *Mr. Rotering* and *Mr. Riley* argued the cause orally.

It is claimed in the brief of appellant that the state wholly failed to show any knowledge on the part of the claimant that she knew any whisky was being sold from her room. Under section 8 of the Prohibitory Enforcement Act, it is the respondent's theory that knowledge of an owner or other person is not necessary, and that the burden in every case is upon the claimant to show that it was not kept for an unlawful purpose. (*Osborne* v. *State*, 77 Ark. 439, 92 S. W. 406; *State* v. *Intoxicating Liquors*, 109 Iowa, 145, 80 N. W. 230; *Commonwealth* v. *Certain Intoxicating Liquors*, 107 Mass. 396; *Farley* v. *Liquors etc.*, 80 Misc. Rep. 32, 141 N. Y. Supp. 696.)

Many courts hold that keeping of large quantities of liquor by any person presumptively is a keeping for sale. (*Combs* v. *Commonwealth*, 162 Ky. 86, 172 S. W. 101; *Campbell* v. *State* (Ala. App.), 78 South. 715; *State* v. *Intoxicating Liquors*, 106 Me. 135, 76 Atl. 268; *State* v. *Jarvis* (Iowa), 165 N. W. 61; *State* v. *Marquardt* (Iowa), 169 N. W. 338.)

In cases of forfeiture of liquor a preponderance of the evidence is sufficient to sustain the judgment. (*Kirkland* v. *State*, 72 Ark. 171, 105 Am. St. Rep. 25, 2 Ann. Cas. 242, 65 L. R. A. 76, 78 S. W. 770.) The question whether the evidence is sufficient or not is for the court, and the question whether a *prima facie* case was made or was overcome is for the court to decide in rendering its decision. (*Stokes* v. *State*, 5 Ala. App. 159, 59 South. 310.)

A sale of intoxicating liquors is not necessary to be shown in order to destroy the liquors seized. It is only necessary that it appear that the liquors were kept or possessed with the in-

lying on the floor in the room. It appears also that Mrs. Nielsen made no claim to the whisky to any of the officers at the time of the seizure. There is also testimony to the effect that Nielsen had reported to the officers the theft of four cases of whisky instead of three, as claimed by Mrs. Nielsen.

Appellant contends that by the introduction of evidence in her behalf as above stated she overcame the *prima facie* case and established conclusively her lawful ownership of the whisky, and her lack of knowledge of or participation in sales made by her husband.

The statute in question provides for proceedings *in rem*, in [1] which the question of ownership is merely incidental. The question involved is primarily whether or not the liquors, *etc.*, were kept or possessed by any person with the intention of violating the prohibition laws of this state. (*State* v. *Kelly*, *ante*, p. 123, 186 Pac. 637.) The statute provides that the affi- [2] davit upon which the search-warrant is issued, and the possession of the liquors, shall be *prima facie* evidence of the contraband character of the liquors, *etc.*, seized, and the burden shall rest upon the claimant to show his property right or interest therein and that the same were not used in violation of and were not in any manner kept or possessed with the intention of violating our prohibition laws.

Prima facie evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. (Sec. 7854, Rev. Codes.)

Counsel assumes that because Mrs. Nielsen testified positively [3] that her purpose in purchasing the liquor was entirely legal, and that no sales thereof had been made, and that she had no knowledge of any illegal sales of other liquors by her husband, there being no contradiction thereof, except circumstantially, and by virtue of the case presumptively made under the statute, the *prima facie* case was overcome.

As said in *Lewis* v. *Lewis*, 76 Conn. 586, 593, 57 Atl. 735: "This involves the mistaken assumption that the direct evidence of a witness or witnesses, if not distinctly contradicted, consti-

tutes undisputed evidence. This is far from true. There may be the best of reasons for discrediting witnesses. There may be circumstances in evidence which in the opinion of the trier ought to outweigh any amount of assertions. These matters all lie within the domain of the trial court. It is the final judge of what is to be believed and what not."

Testimony constituting a mere contradiction of the facts established presumptively by the *prima facie* case does not necessarily suffice to overthrow the same. It will be noted that section 7854 is in the conjunctive and provides that the *prima facie* case must not only be contradicted but overcome as well. When such case is made, contradictory testimony merely amounts to a conflict in the evidence, with the ultimate facts to be determined by the court or jury, as the case may be. (See Rev. Codes 1907, 8028 (2), 7861; *State* v. *Johnson*, 157 Iowa, 248, 138 N. W. 458; *Johnson* v. *Chicago etc. Ry. Co.*, 52 Mont. 73, 155 Pac. 971; *Freeman* v. *Chicago etc. Ry. Co.*, 52 Mont. 1, 154 Pac. 912; *Emerson* v. *Butte E. Ry. Co.*, 46 Mont. 454, 129 Pac. 319.)

The court, applying established rules of evidence, was not bound to believe the testimony of the claimant or her witnesses, but was at liberty to disregard it altogether if it did not consider it as credible, and in addition may have given force to the circumstances surrounding the transaction.

Certainly the purchase of liquor costing $980 by one shown [4] to have no fixed place of abode, except a room in a hotel at the time, later removing to the Leggat, and living merely in a single room therein, storing this large quantity of liquor in gunny-sacks in the closet thereof, filling the same almost to the ceiling, with scarcely room for the reception of wearing apparel, the transfer within the room of bottles from gunny-sacks to a suitcase, the admitted illegal sale of this last-mentioned liquor, the failure of the wife to assert ownership at the time of seizure, taken in connection with the fact that the liquor was in pint bottles, a form more readily adapted to convenience in disposing of the same than for its storage, with the other at-

tendant facts and circumstances, all were sufficient to justify the court in doubting the credibility of the testimony offered in behalf of claimant and in rendering judgment ordering the liquor destroyed.

The appeal from the order denying the motion for new trial is dismissed. (*State* v. *Kelly, supra.*)

The judgment appealed from is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, MATTHEWS and COOPER concur.

STATE EX REL. GOODMAN, RESPONDENT, *v.* STEWART, SECRETARY OF STATE, APPELLANT.

(No. 4,551.)

(Submitted January 19, 1920. Decided January 30, 1920.)

[187 Pac. 641.]

Constitution—Initiative and Referendum—Emergency Clause—Statutes and Statutory Construction—Elections—Primary Law—Amendment.

Constitution—Initiative—Amendments—Power of Legislature.

1. Laws initiated and enacted by the people may be amended by the legislature the same as Acts passed by it, and the validity of such amendments does not depend upon favorable action by the people on a referendum vote thereon.

Statutory Construction—Adoption of Statute from Another State—Rule.

2. Unless the decision of the highest court of another state construing a statute appeals to the supreme court as founded upon right reasoning, it will not be followed simply because the statute was borrowed from that state after such construction.

[As to the construction of an adopted statute, see notes in 1 Ann. Cas. 147; Ann. Cas. 1917B, 651.]

Constitution—Referendum—Emergency—Legislative Declaration not Conclusive.

3. *Held*, that the legislative declaration that an emergency exists and that for that reason a certain Act is necessary for the immediate preservation of the public peace and safety, making the Act nonreferable (Const., Art. V, sec. 1), is not conclusive, the question—backed

by facts—whether the Act is of such character being a judicial one determinable by the courts.

Statutes—Validity—Questions of Expediency, Necessity, *etc.*, of No Concern to Courts.

4. In passing upon the validity of a statute, courts are not concerned with the expediency, utility, justice of, or the necessity for, the legislation, nor with the question whether certain amendments enacted improve the original Act.

Constitution—Referendum—Emergency—How Determined.

5. In determining whether an Act is necessary for the immediate preservation of the public peace or safety, and so excepted from the power reserved in the people to have a referendum, courts may consider the face of the Act, the history of the legislation and contemporaneous declarations of the legislature, the evil to be remedied, and the natural or absurd consequences of any particular interpretation.

Evidence—Judicial Notice.

6. Courts will take judicial notice of the number of general and primary elections, and regular and special sessions of the legislature between two certain dates.

Constitution—Referendum—Meaning of Emergency Clause.

7. *Held*, that the exception embodied in Article V, section 1, of the Constitution, *i. e.*, that Acts necessary for the immediate preservation of the public health, peace or safety shall not be subject to the referendum,—was not intended to extend further than to matters arising out of some unforeseen menace, public calamity, accident, sudden emergency, extraordinary occurrence or unprecedented climatic condition, rendering immediate action imperative to prevent serious or irreparable injury to the public.

Statutory Construction—Legislative Intent.

8. In construing an Act, the intention of the law-making body should be ascertained and given effect.

Constitution—Statutes—Referendum—Primary Act—Not Proper Subject of Emergency.

9. *Held*, that Chapter 28, Laws of 1919, Extra. Session, amending the primary election law, was not necessary for the immediate preservation of the public peace and safety, and therefore not excepted from a referendum. (MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY dissenting.)

Appeal from District Court, Lewis and Clark County; W. H. Poorman, Judge.

PROCEEDING by the State, on the relation of Sam Goodman, against Charles T. Stewart, Secretary of State. Writ of prohibition issued, and defendant appeals. Reversed and remanded.

Mr. S. C. Ford, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for Appellant, submitted a brief; *Mr. Woody* argued the cause orally.

This proceeding was instituted for the sole purpose of having it determined whether the declaration contained in section 13

of Chapter 28, Laws of 1919, Extra. Session, withdraws that Act from the referendum provisions of section 1 of Article V of the Constitution, so that the Act cannot be referred to the people for their rejection or approval at the general election in November, 1920.

Decisions construing provisions excepting from referendum Acts immediately necessary for the preservation of the public peace, health or safety, and those constitutional provisions with reference to the time when Acts shall become effective, and excepting therefrom Acts immediately necessary for the preservation of the public peace, health or safety, are not harmonious, each decision depending upon the particular wording of the constitutional provision of the state in which the decision is rendered. Some of these decisions hold that the legislative declaration of expression in the Act is conclusive, and the courts cannot review the same, while other, and it would seem the better reasoned decisions, hold that such declaration or expression is not conclusive, and that the courts may examine the Act and determine whether or not it does in fact fall within or without the exception. (See *Attorney General* v. *Lindsay,* 178 Mich. 524, 145 N. W. 98; *Miami County* v. *City of Dayton,* 92 Ohio St. 215, 110 N. E. 726; *State* v. *Whisman,* 36 S. D. 260, L. R. A. 1917B, 1, 154 N. W. 707; *Ex parte Hoffman,* 155 Cal. 114, 132 Am. St. Rep. 75, 99 Pac. 517; *McClure* v. *Nye,* 22 Cal. App. 248, 133 Pac. 1145; *Rigdon* v. *Common Council,* 30 Cal. App. 107, 157 Pac. 513; *State* v. *Meath,* 84 Wash. 302, 147 Pac. 11; *State* v. *Howell,* 85 Wash. 294, Ann. Cas. 1916A, 1231, 147 Pac. 1159; *State* v. *Howell,* 85 Wash. 281, 147 Pac. 1162; *State* v. *Clausen,* 85 Wash. 260, Ann. Cas. 1916B, 810, 148 Pac. 28.)

Mr. Henry C. Smith, for Respondent, submitted a brief and argued the cause orally.

The question to be determined by the court is whether the legislative assembly is the sole judge as to when and whether a law is "necessary for the immediate preservation of the public

peace and safety." Our supreme court has not passed directly on this question. In the case of *State ex rel. Ford* v. *Schofield*, 53 Mont. 502, 165 Pac. 594, the so-called "*Carter County*" *Case*, Mr. Chief Justice Brantly, concurring in the opinion of the court as expressed by Mr. Justice Holloway, said in relation to section 26, Article V, of the Constitution which declares: "In all other cases where a general law can be made applicable, no special law shall be enacted": "I am not satisfied that the injunction found in section 26, Article V, of the Constitution is addressed to the judicial department of the government. The creation of new counties is a matter of public policy. The propriety of creating one at any time depends upon fact conditions as they exist at that time. These the legislature can more readily ascertain and weigh than the courts. I therefore incline to the opinion that the injunction is addressed exclusively to the legislature."

However, in other states, this exact question has been decided. In the case of *Bennett Trust Co.* v. *Sengstacken*, 58 Or. 333, 113 Pac. 863, the supreme court of Oregon said: "The legislative branch of the government has the exclusive power to declare that its enactments are necessary for the immediate preservation of the public peace, health and safety, and that hence an emergency exists."

In the case of the *State* v. *Meath*, 84 Wash. 302, 147 Pac. 11, the supreme court of Washington held that the courts should scrutinize a legislative declaration of an emergency and "declare the declaration void in case it is obviously false." The case was decided by a divided court, five to four.

In the case of *Oklahoma City* v. *Shields*, 22 Okl. 265, 100 Pac. 559, the supreme court of Oklahoma said: "The declaring of an emergency by the legislature is conclusive upon the courts." To the same effect are the following cases: *Kadderly* v. *Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222; *In re Menefee*, 22 Okl. 365, 97 Pac. 1014; *Sears* v. *Multnomah County*, 49 Or. 42, 88 Pac. 522; *Dallas* v. *Hallock*, 44 Or. 246, 75 Pac. 204; *Hanson* v. *Hodges*, 109 Ark. 479, 160 S. W. 395; *State* v. *Moore*, 103 Ark.

48, 145 S. W. 199; *Van Kleeck* v. *Ramer*, 62 Colo. 4, 156 Pac. 1108; *State* v. *Crawford*, 36 N. D. 385, Ann. Cas. 1917E, 955, 162 N. W. 710; *State* v. *Bacon*, 14 S. D. 394, 85 N. W. 605; *State* v. *Summers*, 33 S. D. 40, Ann. Cas. 1916B, 860, 50 L. R. A. (n. s.) 206, 144 N. W. 730; *Southerland* v. *Miller*, 79 W. Va. 796, L. R. A. 1917D, 1040, 91 S. E. 993.

We request the court also to examine the case of *State* v. *Marcus*, 160 Wis. 354, 152 N. W. 419, paragraphs 2, 3 and 4 of the opinion by Judge Marshall, as to the importance of the question and the duty resting upon the court to remove the doubt and uncertainty existing. Even the supreme court of Washington has practically nullified its decision in the *Meath Case, supra*, in the case of *State* v. *Howell*, 85 Wash. 294, Ann. Cas. 1916A, 1231, 147 Pac. 1159.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

At the general election held in November, 1906, the people adopted an amendment to section 1, Article V, of the state Constitution, which, by executive proclamation, became a part of the Constitution December 7, 1907. Said section 1 of Article V, as amended, in so far as it is pertinent here, reads as follows:

"The legislative authority of the state shall be vested in a legislative assembly, consisting of a senate and house of representatives; but the people reserve to themselves power to propose laws, and to enact or reject the same at the polls except as to laws relating to appropriations of money, and except as to laws for the submission of constitutional amendments, and except as to local or special laws, as enumerated in Article V, section 26, of this Constitution, independent of the legislative assembly; and also reserve power at their own option, to approve or reject at the polls, any Act of the legislative assembly, except as to laws necessary for the immediate preservation of the public peace, health or safety, and except as to laws relating to appropriations of money, and as to laws for the submission of constitutional amendments, and except as to local or special laws,

as enumerated in Article V, section 26, of this Constitution. The first power reserved by the people is the initiative and eight per cent of the legal voters of the state shall be required to propose any measure by petition; provided, that two-fifths of the whole number of the counties of the state must each furnish as signers of said petition eight per cent of the legal voters in such county, and every such petition shall include the full text of the measure so proposed. * * * The second power is the referendum, and it may be ordered either by petition signed by five per cent of the legal voters of the state; provided, that two-fifths of the whole number of counties of the state must each furnish as signers of said petition five per cent of the legal voters in such county, or by the legislative assembly as other bills are enacted."

At the general election of 1912 the people, in the exercise of the power so reserved to them, initiated a direct primary law. (Session Laws 1913, p. 570.) July 29, 1919, the legislative assembly met in extraordinary session to consider matters connected with the drought conditions, and, on request of that body, the governor specially empowered them to take action with reference to the primary election laws. Under this power the legislature amended the primary election law of 1912 in certain particulars, as will be hereafter noted. (Chap. 28, Laws of Extra. Session 1919.) Section 13 of this Act reads as follows: "This Act is declared to be an emergency law, and a law necessary for the immediate preservation of the public peace and safety."

A referendum petition was thereafter circulated, and, those from a number of the counties having been filed with the secretary of state, this action was instituted in the district court of Lewis and Clark county to prevent the filing of further petitions. A demurrer was interposed and overruled, judgment entered, and a writ of prohibition issued against appellant. This appeal is from the judgment.

1. It is urged by respondent that the declaration by the legislature of an emergency is conclusive upon the courts, and in support of this petition counsel cites: *Kadderly* v. *Portland,* 44 Or. 118, 74 Pac. 710, 75 Pac. 222; *In re Menefee,* 22 Okl. 365,

97 Pac. 1014; *Sears* v. *Multnomah County*, 49 Or. 42, 88 Pac. 522; *Dallas* v. *Hallock*, 44 Or. 246, 75 Pac. 204; *Hanson* v. *Hodges*, 109 Ark. 479, 160 S. W. 395; *State* v. *Moore*, 103 Ark. 48, 145 S. W. 199; *Van Kleeck* v. *Ramer*, 62 Colo. 4, 156 Pac. 1108; *State* v. *Crawford*, 36 N. D. 385, Ann. Cas. 1917E, 955, 162 N. W. 710; *State* v. *Bacon*, 14 S. D. 394, 85 N. W. 605; *State* v. *Summers*, 33 S. D. 40, Ann. Cas. 1916B, 860, 50 L. R. A. (n. s.) 206, 144 N. W. 730; *Southerland* v. *Miller*, 79 W. Va. 796, L. R. A. 1917D, 1040, 91 S. E. 993.

In certain of the cases cited, however, the courts were not called upon to construe constitutional provisions such as we now have under consideration, while in others, as will be hereinafter shown, the decisions have been overruled or superseded by later opinions announcing a different rule.

The referendum is a comparatively modern institution, and has been adopted in less than a fourth of the states of the Union, and, consequently, but few of the courts have been called upon to determine the question here involved, and, as is perhaps natural on entering a new field in which an absorbing interest is taken, a great diversity of opinion has been expressed, not only as between the courts of the several states where the provision has been construed, but also as between the learned judges composing those courts. However, a careful analysis of the authorities will, we believe, disclose the fact that conflicting and contradictory opinions expressed are not so much the result of disagreement as to the general rule applicable, as to the application thereof to particular statutes, and a mistaken assumption on the part of many jurists that the same principle applies to the question here involved as to the questions arising upon statutes and constitutional provisions providing for the declaration of an emergency for the mere purpose of abridging the time in which Acts of the legislature shall go into effect, which class of provisions and litigation existed prior to the adoption of the initiative and referendum provisions in any of the states.

The attorney general suggests that a law initiated by the [1] people cannot be withdrawn from its peculiar position by

an amendment by the legislature, no matter what the circumstances, but that in the case of all initiated Acts the people have the right to the ultimate determination of whether or not the amendments shall be adopted. This suggestion is without merit.

Prior to the adoption of the initiative and referendum amendment to our Constitution, the people of the state, in whom, originally, all power is vested, had delegated to their representatives, the legislative body, the exclusive authority to make laws for the government of the state, subject only to such restrictions as were found in the Constitution and the exercise of the executive veto. By the adoption of the amendment the people did no more than recall that exclusive authority, and reserve to themselves the power to propose laws, and to accept or reject them at the polls, on any subject, save those subjects enumerated in the excepting clauses contained in the amendment. Thereafter, on those subjects not excepted, either the people or the legislature may act at will—their power is coextensive; when an Act is passed by either method, it becomes the law of the state, no more and no less. "Laws proposed and enacted by the people under the initiative clause of the amendment are subject to the same constitutional limitations as are other statutes, and may be amended or repealed by the legislature at will." (*State ex rel. Evans* v. *Stewart*, 53 Mont. 18, 161 Pac. 309; *Kadderly* v. *Portland*, 44 Or. 146, 74 Pac. 710.)

2. The question of the propriety of the writ of prohibition to control the action of the secretary of state is not raised in this action, and will not be disposed of in this opinion.

3. Taking up the analysis of the authorities cited, the first to be considered is that of *Kadderly* v. *Portland, supra*. It would seem from the statement of facts that the city of Portland previously organized an improvement district. The original assessment was adjudged invalid for failure to comply with the requirements of the city charter in force. Later, in January, 1903, the legislature passed an Act "for the incorporation of the city of Portland," attached thereto an "emergency clause," which reads as follows: "Whereas, there are several bridges

be truthfully said that the general rule is that a court will not review the declaration of the legislature; but where the people have put upon the legislature a limitation in the way of a specific definition of its power, and an elimination of Acts of a certain character, the rule is that the declaration of an emergency must conform to the constitutional requirement. [Quoting from 36 Cyc. 1193, 1194]: 'In those jurisdictions in which, under the general rule, statutes do not take effect until some time subsequent to their passage and approval, it is commonly provided that when an emergency exists the legislature may declare a statute in force from its passage. Under such provisions the legislature is the sole judge as to whether the emergency exists, and its declaration is not open to question by the courts. Where, however, such special provisions, permitting the legislature to except statutes from the general rule, are found in the Constitution, the legislative declaration that an emergency exists must conform to the constitutional requirements, and must be clear, distinct, and unequivocal.' '' After quoting from the *Kadderly Case*, the writer of the opinion continues: ''We hesitate to match opinion with one so learned in the law as the writer of this opinion, but conscience impels a different conclusion. His argument is fallacious and unsound. Under the old form, the legislature was acting under a free license to legislate. The people had reserved no right of review. Its act implied discretion, and courts have very properly held that one co-ordinate branch of the government will not review the discretion of another. There was no review or appeal from an expression of that discretion, however violently it wrenched the moorings of constitutional restraint. The declaration of an emergency was final and conclusive. But here no such declaration is final, and should be given no immediate effect unless it can be fairly said that the Act is necessary to preserve the health, peace, or safety of the state.'' Again, returning to the question presented, the writer says: ''The whole error in the reasoning of the respondents, and the cases upon which they rely, is based upon the fundamental error that this inquiry involves a controversy of opinion between two

co-ordinate branches of the government. If the equation could be so stated, we might follow them. It cannot be so stated. There is another factor not occurring under the old order where we took account of the executive, the representative body (the legislature), and the courts. There is now a fourth element, the people, reserving the right to assert its will over the legislative department of the government." In the *Meath Case* the court was divided, five being for and four against the rule laid down.

In the case of *Van Kleeck* v. *Ramer,* cited by counsel, three of the members adopted the "Oregon rule," while two dissented; Justice Scott writing a vigorous and somewhat humorous dissenting opinion, in which he had this to say of the *Kadderly Case*: "The question we are considering * * * was no more than incidentally considered by the Oregon court, and not there fully nor fundamentally reasoned, in the light of the new principle in popular government [the referendum]. The holding in that case has been blindly followed and as hastily considered by those courts which have adopted the conclusion, *viz.*, Arkansas, Oklahoma, and North Dakota, and now by the majority opinion in this case. No one of these courts, including the present case, has offered any additional reason, but have complacently adopted the false premise there assumed. I take it that the Oregon court was misled by previous judicial consideration of emergency legislative constitutional provisions, and the failure to distinguish as between these and the language and principle involved in the initiative and referendum emergency provisions." We note that the writer refers to *North* Dakota; that is, perhaps, a stenographic or clerical error, as the state of North Dakota had not at that time passed upon the question, while *South* Dakota had disposed of the question in the manner indicated. The question was not raised in North Dakota until the case of *State* v. *Crawford, supra,* was decided April 28, 1917.

It might be suggested here, also, that the Oregon court may have been driven to an erroneous declaration of the law by the necessity for the inevitable conclusion reached. As suggested by Justice Scott, there were many important questions to be deter-

mined in the case; the question here involved was but incidental. No one, we take it, on reading the emergency declaration in that case, would presume to say that it did not appear that the conclusion that an immediate necessity existed was inevitable. Realizing the urgency of the necessity, and being familiar with the old rule of construction, proper in the absence of the existence of the initiative and referendum, it is possible that the learned writer of that opinion merely took the wrong lane to reach his proper destination.

The case of *Sears* v. *Multnomah County*, cited, is not in point, as the question here involved was not considered. While it cites the *Kadderly Case*, it was merely in connection with the relation of the initiative and referendum amendment to the provision of their Constitution as to the time when Acts should become effective, and, if an authority on the one side or the other, was rather against respondent, as the court there set aside the attempt of the legislature to cause the Act in question to be immediately effective.

4. It is suggested by respondent that, "the constitutional [2] provision having been adopted from Oregon after a similar one had been construed by the highest court of that state, the presumption is that we intended to adopt the same construction." We have compared the Oregon amendment with our own, and cannot say that our provision bears any more resemblance to the Oregon amendment than to that of any other state adopting such amendment; but, were they identical, our answer to the suggestion is: "The decision of the court of another state construing a statute thereof will not be followed by the court of a state borrowing such statute, unless the decision appeals to it as founded on right reasoning." (*Ancient Order of Hibernians* v. *Sparrow*, 29 Mont. 132, 101 Am. St. Rep. 563, 1 Ann. Cas. 144, 64 L. R. A. 128, 74 Pac. 197; *Finlen* v. *Heinze*, 28 Mont. 548, 73 Pac. 123; *State ex rel. Ford* v. *Schofield*, 53 Mont. 502, 165 Pac. 594.)

State v. *Bacon* and *State* v. *Summers*, cited, were long since, in effect at least, overruled by *State* v. *Whisman*, 36 S. D. 260,

L. R. A. 1917B, 1, 154 N. W. 707, holding that "As to all emergency measures * * * within the purview of the exception, the legislature may declare an emergency to exist, * * * and such declaration and finding * * * is final, and not within the power of the court to question. But as to any measure * * * not within the class, * * * the legislature has no power or authority to declare an emergency to exist, * * * and the action of the legislature in embodying emergency clauses in measures clearly not comprehended within the said exception are wholly unwarranted and void, and should be so held by the courts."

So in the Oklahoma cases of *In re Menefee,* cited, though the Oregon rule was adopted, and later followed in *Oklahoma City* v. *Shields,* 22 Okl. 265, 100 Pac. 559, the court did not hesitate to declare, in the case of *Riley* v. *Carico,* 27 Okl. 33, 110 Pac. 738 (1910), the legislative declaration that an Act was "necessary for the immediate preservation of the peace, health, and safety unconstitutional and void," where it clearly appeared that the legislature had obviously exceeded its constitutional authority.

The supreme court of North Dakota has, within the last few days, held an attempt of the legislative assembly to declare certain legislation "emergency legislation," by the passage of a separate Act, unconstitutional and void. (*State ex rel. Langer* v. *Olson* (N. D.), 176 N. W. 528.)

We will proceed, then, to the consideration of those cases announcing rules under which the court will consider and determine the question before it.

In this class of cases we believe there are two rules: The first, making no distinction between those emergency Acts which affect merely the time within which Acts shall become effective, and those falling within the exceptions contained in the referendum provisions, and applying to the question the old rules of constitutional and statutory construction; the second, recognizing a clear distinction between the two classes of legislation, and declaring that as to the latter the old rules do not apply.

The case of *Attorney General* v. *Lindsay*, 178 Mich. 524, 145 N. W. 98, falls within the first class, although many expressions in the opinion would not seem to justify the strictness of the rule finally announced; and here, as in most of the cases cited on this question, a great diversity of opinion existed among the distinguished members of the court itself. In this case the Chief Justice, whose opinion is, however, not concurred in by any of his associates, points out: "These cases relied upon by respondents, with practical unanimity, base their decision upon this specific provision that an emergency was to be determined by the legislature and declared in the Act. The construction of their constitutions in this respect by the courts of these states may be a proper construction, bringing the provision within the exceptions to the general rule recognized by Judge Cooley. * * * [Cooley's Const. Lim., 7th ed., 76.] The declaration by our legislature (not required by our Constitution), in the body of the Act under consideration, that it was 'immediately necessary for the preservation of the public peace, health and safety,' gives it no added weight; * * * a reasonable inference which might be drawn from such superfluous declaration is that there existed a doubt in the legislative mind as to whether in fact this Act would come within the classification of this provision." Chief Justice McAlvay then proceeds to state what he considers the rule applicable in a case such as we are considering, which sufficiently appears from the opinion in the case, written by Justice Brooke, who states the "Michigan rule": "I agree with my Brother McAlvay that the constitutional provision in question imposes a definite limitation upon legislative action, and that the legislature cannot, with impunity, disregard that limitation * * * that where rights are affected by the improper or illegal action of the legislature, * * * and the injured party has recourse to the courts, the question whether the legislature has acted *within* or *without* the bounds of its constitutional powers is one for judicial determination. In such a case the courts are bound to exercise their constitutional functions, primary among which is the duty to determine whether the legisla-

tive action questioned *is or is not* constitutional. * * * In acting under the section in question, the legislature is not above or beyond the law. It is as certainly bound by the limitations fixed as by any others contained in the instrument. When the question is presented to the courts * * * it must be met and determined the same as any other constitutional question." At this point the argument is discontinued, and the writer continues: "In reaching a determination, however, I am of opinion that every intendment should be taken in favor of the propriety of legislative action. In cases of doubt, the court should never interfere to thwart the legislative will, but, where the action constitutes a clear violation of the limitations imposed, it should unhesitatingly be held to be invalid." Applying the rule so laid down to the particular Act before the court, the writer concludes: "I do not think it can be said with certainty that the Act in question *was not* immediately necessary for the preservation of the public peace, health, and safety, and the courts should interfere only where that conclusion is inevitable." With the statement of this rule three of the Associate Justices concur, while two dissent, holding that the Oregon rule should be adopted.

The question has been more fully considered by, and more often in, the supreme court of Washington than in any of the states, and the leading case opposed to the *Kadderly Case* is that of *State ex rel. Brislawn* v. *Meath,* referred to while considering the Oregon doctrine. There the Washington case is cited with approval, and all the declarations of their Chief Justice accepted. Commenting on the *Kadderly Case,* the Washington court says: "The learned justice who wrote the opinion in the *Kadderly Case* is in error when he says the obvious answer to the question, 'What remedy will the people have if the legislature, either intentionally or through mistake, declares falsely or erroneously that a given law is necessary for the purposes stated?' is 'that the power has been vested in that body, and its decision can no more be questioned or reviewed than the decision of the highest court in a case over which it has jurisdiction.' * * * On the contrary, power has been *withheld,* in so far as a withholding

can be made by apt and certain words. It follows, then, that it is a question of power rather than of discretion. The limitation of that power must be found in the terms of the Constitution, construed in connection with the intent of the people in incorporating such a provision in the Constitution." (Citing *Attorney General* v. *Lindsay, supra.*) The court then points out that it is not sufficient to say that the people still have the right of the initiative to repeal an objectionable law; that "if the people had been content to adopt that plan alone, they would not have reserved the right of the referendum at all. When, therefore, the question comes whether the legislature has a right to declare an emergency which will take away the right of referendum *the doubt, if there be any, should be resolved* in favor of the reserved power of the people instead of in the admittedly unwarranted declaration by the legislature. And in so declaring the courts do not assume * * * that the legislature has abused its discretion. They go no further than to say that the legislature cannot, by any Act which is *not clearly* within its granted power, cut off the right of the people to say for themselves, at an election to be held for that purpose, whether its discretion has been abused or no." "The people, having the old law, the mischief, and the remedy in mind, have said one thing; the legislature, prompted by no apparent motive to preserve the peace and safety of the state, * * * have said another thing. When confronted by these two conflicting declarations, what is a court to do when its jurisdiction is properly invoked? Is it to say, it is helpless * * * ?" (The italics above are ours.)

It is true the court, having thus stated the true rule and emphasized the fact that the doubt should be resolved in favor of the reserved right of the people, attempted to state the rule concisely, and in doing so seems to have contradicted its direct statement, logically reasoned while stating it; for we find in the opinion this statement: "The true rule is the referendum cannot be withheld by the legislature in any case except it be where the Act touches the immediate preservation of the public peace, health, or safety. * * * If the Act be doubtful, the question

of emergency will be treated as a legislative question, and the doubt resolved in favor of the declaration of emergency made by the legislative body." The decision in the case was by a divided court, four of the nine justices dissenting, seeking the adoption of the Oregon rule; the opinion has, however, been followed consistently. (*State* v. *Howell*, 85 Wash. 294, Ann. Cas. 1916A, 1231, 147 Pac. 1159; *State* v. *Howell*, 85 Wash. 281, 147 Pac. 1162; *State* v. *Clausen*, 85 Wash. 260, Ann. Cas. 1916B, 810, 148 Pac. 28; *State* v. *Howell*, 106 Wash. 543, 181 Pac. 37.)

While the determination of the question was not necessary to a decision, the supreme court of Ohio also declared against the position taken by respondent, as follows: "Manifestly the legislature's judgment in that behalf, as shown by the Act itself and the records touching the same, is not conclusive. The people's right to a referendum on any Act of the legislature may be asserted, in a proper proceeding and at a proper time, notwithstanding the action of the general assembly." (*Miami County* v. *City of Dayton*, 92 Ohio St. 215, 110 N. E. 726.)

The supreme court of California has had the question before it in a number of cases, and, while we may not agree with it on the determination of facts in certain cases, particularly that of *Ex parte Hoffman*, 155 Cal. 114, 132 Am. St. Rep. 75, 99 Pac. 517, we agree with its reasoning and with the rule of law adopted.

In *McClure* v. *Nye*, 22 Cal. App. 248, 133 Pac. 1145, the court said: "The said legislative declaration has no greater effect and is no more binding upon the court than if the legislature had declared that a certain measure is or is not constitutional. In such contingency that question would still remain for the courts to determine. The question before us is simply one of construction or interpretation of an Act of the legislature and of a provision of the Constitution, and that is a judicial question." "This amendment to the Constitution provides a scheme for the exercise of what is known as the initiative and referendum, *and, of course, if possible, the language* should be construed so as to make effective this reservation of power on the part of the people. It was clearly their purpose, except where the exigency of the public

service demanded otherwise, that no legislative enactment should become operative until an opportunity was afforded the people to express their judgment as to the merits of the measure. * * * The exceptions * * * are ample enough to prevent any menace to the public welfare by reason of such delay incidental to a submission to popular vote, and they should not be given an interpretation so elastic as to virtually circumvent and nullify the will of the people so solemnly expressed in said constitutional provision."

And in *Rigdon* v. *Common Council,* 30 Cal. App. 107, 157 Pac. 513, the same court says: "We do not find it argued on behalf of appellants that the mere fiat of the council, expressed in the repealing ordinance, to the effect that the public health and safety demanded that the repealing ordinance should take immediate effect, is of any force or virtue whatever."

And in *Ex parte San Chung,* 11 Cal. App. 511, 105 Pac. 609, the court held: "While, in general, it is for the legislature to determine what laws and regulations are needed for the public health, safety, and comfort, statutes attempted to be sustained as an exercise of police power must have some relation to these ends, and if, under guise of police regulation, an attempt is made to violate personal or property rights, they will be overthrown by the courts."

In Nebraska the court has declared that the mere fact of declaring an Act an "Emergency Act" does not make it such. (*State* v. *Pacific Exp. Co.,* 80 Neb. 823, 18 L. R. A. (n. s.) 664, 115 N. W. 619; and three other cases against express companies, disposed of by the same opinion, and reported in 80 Neb. 838, 115 N. W. 625.)

While *Hamilton* v. *Kentucky Distilleries, etc.* (U. S.), 40 Sup. Ct. Rep. 106, holds that the court may not pass upon the necessity of the exercise of a power possessed, such a declaration is not controlling here, as it is not the question under consideration. Here we are considering, not the exercise of a discretion by the legislature, but the attempted abrogation by the legislature of a power reserved to the people. If the Act

in question falls within the exception to the right to exercise that reserved power, no one will question the right and propriety of the legislative declaration, whether necessary to the Act or not, nor will the court attempt to interfere. But it must be remembered that we are not passing upon the validity of a statute nor attempting to overthrow any Act of the legislature. The amendments made to the primary law are valid and will stand as made by the legislature unless rejected by the people at the polls. The only effect of the decision of the court will be either to declare the Act in immediate effect, and foreclose the people of the state from passing upon it, or to permit the suspension of the Act, in the manner provided for in the referendum amendment to the Constitution, until such a time as the people shall have the opportunity to either adopt or reject those amendments at the polls. We are merely called upon to decide whether an admittedly valid and proper Act of the legislature comes within the class of Acts which may, by proper proceedings provided for in the Constitution, be referred to the people, or whether it falls within the exception to the reserved right.

In the case of *Mugler* v. *Kansas*, 123 U. S. 623, 661, 31 L. Ed. 205, 8 Sup. Ct. Rep. 273, 297, the supreme court of the United States has this to say on the subject: "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended * * * its authority. If, therefore, a statute purporting to have been adopted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

The question has never been before this court, but a somewhat analogous case is found in *State ex rel. Ford* v. *Schofield*, 53 Mont. 502, 165 Pac. 594, in which Mr. Justice Holloway, writing the opinion, declares that, upon the question as to who shall

determine whether a general law can be made applicable in any given instance the decisions are in hopeless conflict. "The cases cited by respondents hold that the question is one exclusively for legislative determination, while cases cited by relator hold with equal emphasis that it is one for decision by the courts. * * * We find ourselves unable to agree entirely with either theory established by the adjudications to which reference has been made. * * * We believe there are many subjects of legislation which, from their inherent character, are subject to regulation by general laws, and that the courts are as advantageously situated as any other department of government to say so; on the other hand, there are certain subjects which may or may not lend themselves to regulation by general laws, depending upon extrinsic facts and circumstances which the legislature is peculiarly fitted to ascertain and determine, but which the courts have no means available to ascertain. Upon the first class of subjects the courts can and must determine the applicability of general laws; upon the second, the legislature must be left free to act."

Here, as in the *Schofield Case*, we may say that the decisions are in hopeless conflict; but a careful analysis of all of the authorities cited by appellant and respondent, together with others disclosed by independent research, has convinced us that there is not so great a conflict as would appear from a superficial examination of the authorities. Much of the confusion arises from the assumption, on the part of the courts, that there is no distinction in principle between those cases treating of legislative declarations dealing with emergency clauses, which merely abridge the time in which statutes or ordinances shall go into effect, and consequently raise merely the question as to the propriety of the legislative action under consideration, and that class of cases dealing with the preservation of the public peace, health and safety, and which infringe upon the reserved power of the people to refer the Act under consideration. As to the first class of cases, we concede that the strict rules of constitutional and statutory construction, laid down in the Michigan case cited, to-wit: "Every intendment should be taken in favor of

the propriety of legislative action," and "in case of doubt" the doubt will be resolved "in favor of the propriety of legislative action," prevail. We are not here called upon, however, to determine merely the constitutionality of a legislative Act, or to decide as to whether a legislative body clearly exceeded its authority; but we are to determine a legal controversy between two law-making bodies of the state—on the one hand the people, who are supreme, the creator of the legislature, in whom, originally, all power is vested; and, on the other hand, the legislature, the creature of the people. Such a controversy, we believe, involves more than the determination of a mere negative question, as would be the case were we to apply the Michigan rule strictly.

We hold, therefore, to the rule laid down in the case of *State ex rel. Brislawn* v. *Meath*, cited that "When, therefore, the question comes whether the legislature has a right to declare an [3] emergency which will take away the right of referendum, the doubt, if there be any, should be resolved in favor of the reserved power of the people, instead of in the admittedly unwarranted declaration by the legislature." Our constitutional provision does not provide for any declaration on the part of the legislature in order to bring any Act within the class on which a referendum can be ordered. The legislature might, with propriety, determine the question, while considering a bill, and incorporate the fact conditions in the Act itself, but such action on their part is not necessary. This proceeding might have been, with equal propriety, commenced had the legislature made no declaration of necessity; the facts are controlling, and not the declaration of the legislature, which, unsupported by facts shown, amounts to nothing more than a legal conclusion.

The declaration that the Act is necessary for the immediate preservation of the public peace and safety has no more binding force than would the declaration in an Act that "this Act is constitutional," or "this is a general and not a local or special Act." (*State ex rel. Brislawn* v. *Meath, supra; Ex parte*

Hoffman, supra; McClure v. *Nye, supra.*) The declaration is, then, the "unwarranted declaration of the legislature."

In this country the power once vested in a king vests in the people, and the courts sit as their representatives. (*Bridges* v. *McAlister,* 106 Ky. 791, 90 Am. St. Rep. 267, 45 L. R. A. 800, 51 S. W. 603.) Under the federal Constitution, the duty of determining and declaring the constitutionality of an Act by the courts is imperative. (U. S. Const., Art. VI.) Whenever, therefore, a legal controversy arises over the constitutionality of an Act, or as to whether a given Act is within or without the authority of the legislature, the determination of that fact is essentially a judicial question, to be determined by the courts. (*McClure* v. *Nye, supra; Ex parte Hoffman, supra; State ex rel. Brislawn* v. *Meath, supra.*)

5. We proceed, then, to the consideration of the Act itself, shorn of the superfluous conclusion of the legislature that the Act is "necessary for the immediate preservation of the public peace and safety."

With the expediency, utility, justice or the necessity for the [4] legislation we are not concerned; neither is it within our authority, nor do we wish to say whether or not the amendments enacted would improve the original primary law. (*State ex rel. Taylor* v. *Duncan,* 52 Mont. 69, 155 Pac. 1111; 25 R. C. L. 808.) All that we are concerned with is the necessity of the passage of the Act, without permitting the people to accept or reject it at the polls, under their reserved right, for the *immediate* preservation of the public peace and safety. This consideration, we feel in the present instance, embraces more than a mere scanning of the Act to determine whether "the conclusion is inevitable" that the Act "*does not* fall within the limitation," but requires, under the rules heretofore laid down, an actual determination on the part of the court as to whether or not the Act does actually come within that class of subjects necessary for the immediate preservation of the public peace and safety. It is no idle play of words, but an actual and solemn duty, devolving upon the court to determine, as between two litigants having

coextensive power of legislation, except where restricted, as to where lies the right.

"The people said to the legislature: Make such laws as you will, but you may not legislate so as to take away our right to pass upon the laws you have enacted, 'except such laws as may be necessary for the immediate preservation of the peace, health, and safety.' * * * To hold that the old rule of construction applies is to write this reservation out of the Constitution. * * * The reservation in the amendment is a declaration of 'thou shalt not,' except it be for the safety or support of the state." (*State ex rel. Brislawn* v. *Meath, supra.*)

Having arrived at the conclusion that from the modern trend of the authorities on the comparatively new question, and from reason and logic, the rule we should adopt is that the declaration by the legislature is not final nor conclusive, nor is to be considered merely as a contemporaneous declaration or expression of the legislature, and that the question must be determined by the courts as arbiters between two equally powerful bodies of the same branch of the government, and in that determination the doubt as to whether the Act in question is or is not immediately necessary for the purpose named, if any there be, shall be resolved in favor of the people, in whom the power originally vested and who have reserved the power to themselves to refer any Act, except in those instances enumerated, we will seek to apply the rules laid down to the matters set forth.

In this determination the utmost that we can take into [5] consideration will be the face of the Act itself; the history of the legislation, and contemporaneous declarations of the legislature (*Carpenter* v. *Rodgers*, 1 Mont. 90; *Melzner* v. *Northern Pac. Ry. Co.*, 46 Mont. 162, 127 Pac. 146); the evil to be remedied (*Johnson* v. *Butte C. Co.*, 41 Mont. 158, 48 L. R. A. (n. s.) 938, 108 Pac. 1057); and the natural or absurd consequences of any particular interpretation (*Blevins* v. *Graham Co.* (Okl.), 182 Pac. 247).

We find from the face of the Act that the original primary election law was "initiated and passed at the general election of

1912," and has been in force and effect for more than six years prior to the amendment. Analyzing the Act, we find it makes the following changes:

1. Changes the time of holding primaries so that in a presidential election year we shall have but one primary election.

2. Provides for rotation of names on the primary ballot.

3. Prohibits a candidate, defeated in the primary, from appearing on the ballot in the general election, except under certain conditions.

4. Changes the primaries from "open" to "closed" primaries.

We find from contemporaneous declarations of the legislature, through the joint committee report, that "the operation of the present primary law, during the years it has been in force prior to the election of 1918, resulted in so much complaint of the interference by others than members of the party in the primary of the party, and of the expense attendant upon holding two primary elections in presidential years, and criticism directed at other features of the law, that" both the Republican and the Democratic parties "paid heed" to the criticisms, and declared in favor of amending the law; that in response to these declarations the legislative assembly of 1919 passed an Act amending the law, which Act was, however, to be submitted to the people at a special election to be held September 2, 1919. (Chap. 113, Laws of 1919.) We find further from this report that the purpose in submitting the Act to the people at a special election, rather than to wait until the general election of 1920, was that it "would enable them [the people] to decide upon such amendments, without having the question confused or obscured by being voted upon at a general election, where a multitude of other important questions and the selection of many candidates for various offices might tend to preclude a careful consideration of the law so submitted." Certain persons having attempted to subject the referendum measure to a referendum by petition, the secretary of state, on advice of the attorney general, attempted to halt the special election, and the committee, deeming the time too short to determine the matter, recommended further action

by the legislature, "in view of the general sentiment in favor of amending the present law so as to preserve party unity and integrity, and to save the expense of two primaries in presidential election years, and to correct other manifest imperfections in the present law."

As to the duplication of primary elections in presidential election years, the matter was called to the attention of the court, and by this court called to the attention of the people in December of 1915, by the opinion of this court, speaking through Mr. Justice Sanner, in *State ex rel. Taylor* v. *Duncan*, 52 Mont. 69, 155 Pac. 1111, where the court said: "That these [the primary election] laws are an attempt by the people to enact in this state the general features of the primary law of Oregon cannot be open to doubt, and it must likewise be conceded that the effort to adapt the provisions of that law to the legislative and other conditions of this state has been most unskillfully performed. * * * The Oregon law * * * constituting one law, the effect of which is to require but one primary election in presidential years. Had it been the intention to so provide in this state, the Oregon law as a whole would doubtless have been enacted in one law. This was not done."

The court will take judicial notice of the fact that between [6] the time of the adoption of the primary election law and the convening of the extraordinary session of the legislature in 1919 three general elections had been held in the state, and three primary elections for the nomination of state and county officers, and one primary election for the nomination of presidential electors, and that during said period the legislature had convened in regular session four times, and, in addition thereto, a special session of the legislative assembly was called in the year 1918.

Finally, we have the contemporaneous declaration of the legislature contained in the Act itself, that "this Act is declared to be an emergency law, and a law necessary for the immediate preservation of the public peace and safety." (Sec. 13, Chap. 28, Laws Extra. Session 1919.)

We feel that the foregoing *résumé* contains the limit of the matters which the court may take into consideration in determining the question.

The two Acts under consideration—that is, the originally initiated primary election law and the amendments thereto, which [7] the legislature has declared necessary for the immediate preservation of the public peace and safety—present the divergent views of the people of the state as to the policy to be employed in the holding of primary elections, the people having provided for an "open" primary, and the legislature having changed it to a "closed" primary. Given the opportunity, the people may desire to adopt the policy favored by the legislature. We are told by the record of the legislature that a demand had arisen for such a change, and that great abuses had crept in which threaten "party unity and integrity"; yet the state has gone through at least three general elections, three primary elections for state and county officers, and one for presidential electors, under the old law, without the "immediate necessity" being so crying as to result in action; the legislature has been in regular session three times, and once before, in the year 1918, was in special session, without definite action being taken until the regular session of 1919. At that time, it is true, amendments were passed and referred to the people, the legislature calling for a special election to be held September 2, 1919; but was the special session called because the legislature deemed it necessary to change the primary law before another primary election could be held? Not at all; the reason for the calling of a special election was declared by the legislature to be that it would enable the people "to decide upon such amendments without having the question confused or obscured by being voted upon at a general election, where a multitude of other important questions and the election of many candidates for various offices might tend to preclude a careful consideration of the law so submitted." (Report of special committee.) A question having arisen over the holding of the special election, the committee recommended further action of the legislature, to the end that the primary law

might be amended; for what purpose? Was it for the immediate preservation of the peace and safety of the state? We find the declaration of this purpose also in the report of the committee, which recommends the change "so as to preserve party unity and integrity, and save the expense of holding two primaries in presidential election years, and to correct other manifest imperfections in the law." Again, a matter of policy, difference of opinion or judgment, as to which is the best method of handling elections, were the people to reject the amendments.

Of the policy of the Act we have nothing to say; it is not for us to pass upon, but is a question between the people and the legislature; and certainly the people have not given to the legislature plenary power to determine questions of policy, and thus preclude the mass of the people from passing upon the same.

Three elections had been held under the old primary law; all the present state and county officials, district judges, and members of the supreme court, except as to those appointed to fill vacancies, and every member of the legislature making the declaration above, were nominated for the office to which they were afterward elected. No sudden emergency, no extraordinary event, no immediate necessity arose between the adjournment of the regular and the convening of the special session of the legislature in 1919. Why, then, the declaration of necessity at the later date? Or, if conditions were the same then as they had been during several years prior thereto, and at the time of the holding of former primary elections, why the necessity at all? Can it be said that under such conditions the legislature was justified in declaring that the delay incident to a referendum would be an immediate menace to the public peace and safety? We think not.

Whether those states which still adhere to the system of vesting all legislative power in the legislature, or those which have adopted the initiative and referendum, and whether, in the latter class, those which have the open primary or the closed primary, have followed the more correct system, is not for us to determine. In this state it is the fundamental law that the people

[8] may themselves propose legislation, and may refer all Acts passed by the legislative body, suspending the operation of those Acts until the people have had the opportunity to either accept or reject them at the polls, except as to those Acts enumerated in the constitutional amendment; and, as to the particular exception here under consideration, it is clear that the people did not intend that the exception should extend further than to those matters arising out of some unforeseen menace, public calamity, accident, sudden emergency, extraordinary occurrence or unprecedented climatic conditions, rendering immediate action imperative to prevent serious or irreparable injury to the public. It was certainly not the intention of the people, having determined to depart from the policy of vesting all legislative power in a representative body, and to reserve to themselves the right to pass upon all Acts of the legislature, except as to those necessary for the *immediate* preservation of the public peace, public health, or public safety, to then place in the hands of the legislature a weapon to defeat and destroy that power so reserved and to nullify the constitutional reservation thereof.

In considering the Act before us we are apt to think only of the Act of the legislature, and forget that we are construing the Act of the people, the constitutional amendment providing for the initiative and referendum, and that the authority of the legislature to pass Acts without subjecting them to the referendum is subordinate to the greater question of the right of the people to refer all Acts, unless they come within that classification of subjects on which the public interest requires immediate action. Therefore the rules of constitutional and statutory construction apply primarily to the constitutional provision under discussion, and, if they conflict with the application of the rules to the Act under consideration, the latter must give way to the former. For example: In construing an Act the intention of the law-making body should be ascertained and given effect; in this instance, the intention of what law-making body? The answer is, the intention of the sovereign people in

the enactment and adoption of the constitutional amendment providing for the initiative and referendum.

To hold that the courts are powerless to act, or to hold that, having assumed authority, they can go no further than to inquire as to whether, from the face of the Act, it appears that "it is inevitable that the Act does not fall within the classification," is to thwart the intention of the people in the adoption of the initiative and referendum amendment, and to declare that the legislature, created by the people, is more powerful and entitled to greater consideration at the hands of the courts than its creator.

If we adopt the Michigan rule strictly, as declared by Justice Brooke and approved by a divided court in that state, we might as well go all the way, and adopt the Oregon rule; for we may apply that test to nine out of every ten enactments of the legislature in either regular or special session, and we must then declare that "we cannot say that it is inevitable that the Act does not fall within the classification." Applying that test, we are but testing the necessity of the enactment under any circumstances, not the *immediate* necessity, required to warrant the extraordinary action preventing referendum to the people.

Applying the rule contended for to its logical conclusion, the interpretation becomes absurd. As illustrative of the lengths to which a legislature might go, if the courts are not permitted to review their action, we wish to quote from *State* v. *Crawford, supra,* where, after stating that, of the 273 Acts of the legislative assembly of 1914, 64 were passed with the emergency clause attached, the writer continues: "As the Laws of 1917 have not yet been published, I cannot give so definite a statement regarding the emergency clauses—many of them are framed under section 67, and others under the peace, health and safety section. Thus, the Sabbath bill declares it necessary for the peace, health and safety that the bill should take effect and be in force from and after its passage. A bill appropriating $1,500 for railroad commissioners declares it necessary for the peace, health and safety; and so of a bill appropriating a few dollars for the school

of mines; and so of a bill taking private property to lay out a highway. And a bill appropriating $75 expense on a bust of Abraham Lincoln is declared necessary for the public peace, health and safety."

Clearly the Act in question, stripped of the superfluous [9] declaration of the legislature, contains nothing to warrant the assumption that it is necessary for the *immediate* preservation of either the peace or safety of the state; nor is there anything in the history of the legislation, the contemporaneous declarations of the legislature, the purpose of the Act, or the evils sought to be remedied, showing a fact condition justifying either the legislature or the court from withdrawing the Act from consideration of the people.

Under our system of government the people rule, and that rule is by the majority; it is the duty of the minority to bow to the edict of the majority in matters of policy and procedure. To say that the Act must stand without submission to the people, out of fear that they will not adopt the amendments, is to overthrow the rule of the majority and substitute that of the minority.

We find that the Act amending the primary election law does not come within the purview of the exception, and is subject to the referendum as provided by the constitutional provision; and therefore the judgment of the lower court is reversed, the writ of prohibition set aside, and the cause is remanded, with direction to dismiss the proceeding.

MR. JUSTICE HURLY and MR. JUSTICE COOPER concur.

MR. JUSTICE HOLLOWAY: I dissent. While it is incumbent upon this court to maintain the referendum amendment to our Constitution in its utmost vigor, the referendum itself is not all inclusive. In adopting it the people particularly excepted from its operation "laws necessary for the immediate preservation of the public peace, health and safety," and this exception is as vital a part of the Constitution as is the referendum itself,

and to give full force and meaning to the exception is a duty as imperative as any other imposed upon this court. Whether the Act in question comes within the exception, and is therefore not subject to the referendum, depends upon the answer to two questions: (1) Does the subject matter of the Act bear any reasonable relationship to the public peace or safety? and (2) did there exist such an emergency as rendered it necessary that the Act be effective immediately? The first is a question of law; the second a question of fact. The first involves the essential element of an exercise of legislative power; the second involves the exercise of legislative discretion.

1. Neither reason nor authority supports the view that the terms "public peace," "health" and "safety" have to do only with extraordinary occurrences arising out of public calamity, such as insurrection, pestilence, invasion or rebellion. In *Mugler* v. *Kansas*, 123 U. S. 623, 662, 31 L. Ed. 205, 8 Sup. Ct. Rep. 273, 297 [see, also, Rose's U. S. Notes], the supreme court of the United States said: "We cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks."

Throughout the legislative history of Montana, from its organization as a territory to the present time, the term "public peace" has been used as synonymous with good order in society; to denote quiet, and freedom from agitation or disturbance. (6 Words & Phrases, 5806.) "Public safety" means public security, and relates to matters affecting the stability and orderly and efficient administration of government, and the general welfare of the people as indicated in the *Mugler Case*, above.

There is no mathematical rule by which to determine whether election laws do or do not affect the public peace or safety; but I undertake to say that no other subjects are more intimately connected with the public peace and security than honesty and integrity in politics, which are sought to be secured by our election laws. But if there is any reasonable doubt, however, as to whether the Act in question bears a real or substantial relation

to the public peace or safety, the court should not interfere to thwart the legislative will. Every reasonable intendment should be taken in favor of the propriety of legislative action; and it is only when a statute purporting to have been enacted to protect the public peace or safety does not touch either of those objects, or is a palpable invasion of rights secured by the Constitution, that the courts may interfere. These rules are elementary, and arise of necessity from the relationship existing between the co-ordinate branches of our government. (*Mugler* v. *Kansas*, above; *Attorney General* v. *Lindsay*, 178 Mich. 524, 145 N. W. 98; *State ex rel. Case* v. *Howell*, 85 Wash. 281, 147 Pac. 1162; *State* v. *Moore*, 76 Ark. 197, 70 L. R. A. 671, 88 S. W. 881; *State* v. *Whisman*, 36 S. D. 260, L. R. A. 1917B, 1, 154 N. W. 707.)

The legislature of this state possesses plenary law-making power, except in so far as it is limited by the state Constitution and by the supreme law of the land (*State ex rel. Evans* v. *Stewart*, 53 Mont. 18, 161 Pac. 309); and this rule was not affected in the least by the adoption of the initiative and referendum amendment. As a corollary of this is the rule that a statute will not be declared unconstitutional unless its nullity is placed beyond reasonable doubt. (*State ex rel. Hay* v. *Alderson*, 49 Mont. 387, Ann. Cas. 1916B, 39, 142 Pac. 210.)

It cannot be said that the Act in question bears no reasonable relationship to the public peace or safety, and the effect of the majority opinion is to render the exception to the referendum amendment a dead letter.

2. Whether an emergency existed which made it necessary that the Act should be effective immediately involves only a question of fact; and it is elementary that whenever the right to enact a particular law depends upon the existence of facts, it will be presumed that the legislature, in the exercise of its appropriate functions, found the facts, and no authority is conferred upon the courts to consider evidence to impeach the legislature's findings. (*Stevenson* v. *Colgan*, 91 Cal. 649, 25 Am. St. Rep.

230, 14 L. R. A. 459, 27 Pac. 1089, and numerous cases cited in the note to this case reported in 14 L. R. A. 459.)

The pronouncement by the majority that the finding that an emergency existed is "the unwarranted declaration of the legislature" rests only on the bare *ipse dixit*.

It is said that the "facts are controlling and not the declaration of the legislature," and the controversy is determined as one of fact; but the conclusion is made to depend upon only such evidence as is furnished by the documents referred to. Whatever other evidence may have been before the legislature to justify its finding that an emergency existed is not known to this court, and, from the very nature of the case, could not be known.

Conceding, for the sake of argument, that in this instance the court may consider extraneous matters, it is, to say the least, a most extraordinary proceeding to determine the controversy upon a portion of the evidence only.

MR. CHIEF JUSTICE BRANTLY: I concur in the dissenting opinion of MR. JUSTICE HOLLOWAY.

CORNELL, RESPONDENT, *v.* GREAT NORTHERN RY. CO. ET AL., APPELLANTS.

(No. 4,394.)

(Submitted December 10, 1919. Decided February 2, 1920.)

[187 Pac. 902.]

Railroads—Master and Servant—Personal Injuries—Employers' Liability Act—Evidence—Mortality and Annuity Tables—Loss of Sight—Contributory Negligence—Partial Defense—Pleading—Burden of Proof—Instructions—Physical Examination of Plaintiff—Assumption of Risk.

Personal Injuries—Master and Servant—Railroads—Excessive Verdict.

1. *Held*, that a verdict for $17,500 for the partial loss of plaintiff's left eye, the sight of the right having been destroyed many years before, was excessive, it appearing that he was sixty-seven years of age, with a life expectancy of ten years, was at the time of the accident, and had

been for the five years preceding, earning $50 a month operating a stationary gasoline engine at a water-tank.

Same—Mortality Table—Evidence.

2. Mortality tables are competent evidence to aid the jury in determining the probable duration of the life of an injured employee, and may be used to aid them, by comparing his earnings before and after the injury, to ascertain the amount which will compensate him for his loss by reason of impairment of his earning capacity.

Same—Damages—Mortality and Annuity Tables.

3. In determining the amount to be awarded plaintiff in a personal injury action, the jury must be left to exercise their discretion, unlimited by any fixed standard, after examining the facts and circumstances of the case, considering annuity and mortality tables, *etc.*

Same—Mortality Tables—Evidence—Purpose of Introduction.

4. The office of mortality tables in a personal injury case is to furnish the jury a basis by which they may ascertain the present worth of the several sums which, but for the injury, would have been received by plaintiff in the form of deferred payments, and the earning power of money in the general community in which the injury occurred; they can only serve as a guide in determining the amount of the verdict and not as an absolute standard by which to fix the award.

Same—Instructions—Mortality and Annuity Tables—Not to be Viewed as Definite Standard for Awarding Damages.

5. *Held*, that an instruction from which the jury could infer that they were at liberty to regard mortality and annuity tables as furnishing an authorized and definite standard by which they might fix their award in a personal injury action, was prejudicially erroneous.

Same—Loss of Sight—Cost of Attendant—Evidence—When Incompetent.

6. Evidence that it would cost $100 a month to provide an attendant for a blind man, *held* incompetent where the question whether plaintiff, where sight, though impaired, was not destroyed, would ever need an attendant was left to speculation as to what might or might not occur in the future.

Same—Total Blindness—Care and Attendance—Damages.

7. *Obiter:* In a case in which the plaintiff has become totally blind by reason of the injury complained of, or where there is evidence tending to show a reasonable probability that the injury will finally produce that result, the jury may, in assessing the damages, take into consideration the fact that he will need care and attention by others, if there is evidence showing with reasonable certainty that such need will arise and when it will arise.

Same—Employers' Liability Act—Purpose of Legislation.

8. The purpose of the legislature in enacting the Employers' Liability Act (Chap. 29, Laws 1911) was to substitute for the benefit of railway employees the action provided by it, in place of the common-law action, and, in case of death, to create a new cause of action in favor of the dependents named, for the pecuniary loss suffered by them.

Same—Employers' Liability Act—Pleadings.

9. The Employers' Liability Act (Chap. 29, Laws 1911), does not change in any particular the form of the statement of plaintiff's cause of action from that at common law, but does require all the other pleadings to be so formulated as to present the issues arising upon defenses permitted by it, including the matter which may be alleged in mitigation of damages.

Same—Contributory Negligence—Burden of Proof.

10. *Held*, that the rule that in a personal injury action the burden of pleading and proving contributory negligence on the part of the plain-

tiff is upon defendant was not changed by the Employers' Liability Act, *supra*, and that refusal of an offered instruction placing the burden upon plaintiff was proper.

Same—Contributory Negligence—Partial Defense—Must be Pleaded.

11. Under the rule of comparative negligence declared by Chapter 29, Laws of 1911, contributory negligence on the part of plaintiff is a partial defense which must be pleaded.

Same—Physical Examination—Instructions—Proper Refusal.

12. An instruction that plaintiff's refusal to submit to a physical examination in the presence of the jury might be considered by them and given such weight as they might in their discretion deem proper, *held* properly refused, the defendant, under *May* v. *Nothern Pac. Ry. Co.*, 32 Mont. 522, not having any right to demand such an examination.

Same—Assumption of Risk—When Defense not Available.

13. *Held*, that the defense of assumption of risk was not available to defendant, in an action under Chapter 29, Laws of 1911, where such risk arose by reason of the negligence of one of defendant company's employees in failing to make proper repairs on a gasoline engine when called to his attention.

Same—Assumption of Risk—Jury Question.

14. The question whether plaintiff assumed the risk incident to remaining in defendant's employment for a period of two months and a half after repairs on a gasoline engine became necessary, but were not made, was a question to be determined by the jury.

[On excessiveness of verdicts in actions for personal injuries in impairment or loss of eyes, see comprehensive note in L. R. A. 1915F, 199.]

[On the use of mortality tables as evidence, see notes in 40 L. R. A. 553; L. R. A. 1918C, 1071.]

Appeal from District Court, Musselshell County; Geo. P. Jones, Judge.

ACTION by William D. Cornell against the Great Northern Railway Company and another. From a judgment for plaintiff and a denial of a new trial, defendants appeal. Reversed and remanded.

Messrs. Veazey & Veazey, for Appellants, submitted a brief; *Mr. I. Parker Veazey, Jr.*, argued the cause orally.

The Excessiveness of the Award: The plaintiff was sixty-seven years of age. This is a case, therefore, where practically the injured man's working days were over. It is a case almost without parallel in injury cases where the age of the plaintiff was so great. As far as any reported cases showing what awards have been given for similar injuries, it is absolutely without parallel, all the reported cases involving awards to persons of

a much different age. We refer the court to the very elaborate note in L. R. A. (n. s.) 1915F, pages 30 to 512, setting forth excessiveness in personal injury verdicts, in cases embracing personal injuries of every conceivable kind. Loss of or injury to eyes is covered on pages 194 to 199. We submit the following authorities from that note: *Olwell* v. *Skobis*, 126 Wis. 308, 105 N. W. 777; *De la Vergne etc. Mach. Co.* v. *Stahl*, 24 Tex. Cr. 471, 60 S. W. 319; *Cook* v. *Missouri Pac. R. Co.*, 94 Mo. App. 417, 68 S. W. 230; *Muetze* v. *Procasky*, 126 Ill. App. 589; *Peterson* v. *Roessler etc. Chemical Co.*, 131 Fed. 156. In this case, by comparison with other cases, all of the facts on damage are against the plaintiff—extreme age, short expectancy, low earnings, previous injury, and mere impairment, though an actual impairment, of vision as distinguished from total loss of sight. The amount to be fixed by the court should be consistent with these facts, and should be able to stand comparison if a case were before the court where the reverse picture were presented.

The whole matter of annuity tables has been, we find, so thoroughly canvassed by this court and by the supreme court of the United States, that we will content ourselves by citing but one case from the supreme court of the United States and four cases from the supreme court of this state: *Bourke* v. *Butte Elec. & Power Co.*, 33 Mont. 267, 288, 83 Pac. 470; *Lewis* v. *Northern Pac. Ry. Co.*, 36 Mont. 207, 224, 92 Pac. 469; *Robinson* v. *Helena Light & Ry. Co.*, 38 Mont. 222, 245, 99 Pac. 837; *Moyse* v. *Northern Pac. Ry. Co.*, 41 Mont. 272, 291, 108 Pac. 1062; *Vicksburg etc. Ry. Co.* v. *Putman*, 118 U. S. 545, 30 L. Ed. 257, 7 Sup. Ct. Rep. 1.

The Act of 1911 (Chapter 29) is not a mere fellow-servant statute. It is a law imposing liability for primary as well as secondary negligence. It imposes liability for negligence of vice-principals of officers, as well as for negligence of fellow-employees in train movements, and it also imposes liability to all railway employees for injuries resulting in whole or in part "by reason of any defect or insufficiency due to its negligence in its engines, appliances, machinery, works or

other equipment." The statute, therefore, covers this case, as this is an injury claimed to have resulted from defects in engines, appliances, machinery, works or other equipment.

May the plaintiff, however, elect to sue at common law instead of under the statute? The Act of 1911 is a full and complete exposition of the views of the legislature as to what should be the liability of railway corporations for injuries to, and death of, its employees. It covers everything. As stated, it is not a mere fellow-servant law, but is a law defining, and intended to define, the full and complete liability of railway companies to its employees. In death suits it will be noted that it gives the right of action to new beneficiaries, and in some respects enlarges and in other respects curtails the list of beneficiaries. It is also clear that it was the intention of the legislature to do away with all confusion existing in existing legislation (distinctions between survival actions and death actions, between instantaneous death and other deaths, between fellow-servant defenses and contributory negligence), and to embrace in one law a definition of the entire liability, and to make that liability conform to the federal law: the liability to the intrastate employee was to be the same as the liability to the interstate employee.

Moreover, sections 6213 and 8060, Revised Codes, provide that "In this state there is no common law in any case where the law is declared by the Codes or other statute." The effect of this statute cannot be misunderstood. It has been applied in the following cases, which are helpful here: *State* v. *Crowe,* 39 Mont. 174, 178, 18 Ann. Cas. 643, 102 Pac. 579; *Marron* v. *Great Northern Ry. Co.,* 46 Mont. 593, 603, 129 Pac. 1055; *In re Beck's Estate,* 44 Mont. 561, 580, 121 Pac. 784, 1057; *Truro* v. *Passmore,* 38 Mont. 544, 549, 100 Pac. 966; *Cunningham* v. *Northwestern Imp. Co.,* 44 Mont. 180, 181, 216, 119 Pac. 554; *McKnight* v. *Oregon Short Line R. Co.,* 33 Mont. 40, 42, 82 Pac. 661, 662; *John* v. *Northern Pac. Ry. Co.,* 42 Mont. 18, 38, 32 L. R. A. (n. s.) 85, 111 Pac. 632. We can add nothing to the unreported opinion of Judge Bourquin, in this district, sustain-

ing a demurrer and holding directly that there is now no common-law liability to employees, but that their rights are governed by this statute. (See *Kane* v. *Great Northern Ry. Co.*)

Under Chapter 29, Laws of 1911, contributory negligence is no longer a defense in an action, but concerns only the issue of damages. The statute expressly provides that contributory negligence shall not be a defense, but that the damages shall be diminished in proportion to the amount of negligence attributable to the employee.

As contributory negligence is thus no longer a defense and concerns the issue of damages only, it follows that it is no longer necessary to plead the same, and evidence thereof is admissible under a general denial; and it follows similarly that the burden of proving damages being on the plaintiff, the burden of proving that whole issue is on the plaintiff; and, therefore, where an issue arises in the trial on evidence as to contributory negligence, the burden of proof is on the plaintiff to show how much the defendant's negligence contributed to cause the accident, and the extent of the contribution, or absence of contribution, by the plaintiff's negligence. (*Kansas City So. R. Co.* v. *Jones,* 241 U. S. 181, 60 L. Ed. 943, 36 Sup. Ct. Rep. 513, 514, 11 N. C. C. A. 43.)

Mr. E. E. Enterline and *Mr. G. J. Jeffries,* for Respondent, submitted a brief and argued the cause orally.

The Excessiveness of the Award: Counsel for appellants cite certain authorities and the elaborate note in L. R. A. (n. s.) 1915F, pages 30 to 512, in which note is set forth excessiveness of awards in personal injuries of various kinds. Counsel for appellants conclude the discussion on this branch of the case with the statement that after the publication of the elaborate note in the authority cited *supra,* "it cannot be claimed that courts have no guide in the matter of handling excessive awards in personal injury cases." It would be manifestly unfair to consider the annotations as completely controlling. Each case must depend upon its own facts. While it is true that courts

examine other cases for the purpose of determining in a way the reasonableness of an award, yet changing conditions and the facts in any given case may often require a radical departure from the awards either approved or condemned. All the cases referred to by counsel for appellants were decided before prices had advanced for labor and living expenses. This court no doubt will take judicial notice that it takes more than three dollars to purchase now what one dollar would have purchased formerly. The courts have a right to take into consideration in passing upon the amount of damages the difference in the present and past value of money, also as affected by the newer and older parts of the country. (Watson on Personal Injuries, sec. 362.)

There is no such passion or prejudice disclosed by the record as would authorize this court to grant appellants a new trial, even though this court should conclude that the verdict was excessive. (*Yergy* v. *Helena L. & Ry. Co.*, 39 Mont. 213, 18 Ann. Cas. 1201, 102 Pac. 310; *Neary* v. *Northern Pac. Ry. Co et al.*, 41 Mont. 480, 110 Pac. 226; *Ardmore Oil & Milling Co.* v. *Barner* (Okl.), 179 Pac. 932; *Bothe* v. *True*, 103 Kan. 562, 175 Pac. 395.)

Respondent was furnished by the master with a defective bolt. This bolt was used by the respondent in making a temporary repair on the gasoline engine which he was operating. Immediately after the repair was made it was inspected by Hudgin, the pump repairer, who assured the respondent that the same was all right and to go on and use it until the proper bolt could be obtained. He also assured the respondent that he would order the same immediately, and his testimony shows that he did order them but that he neglected to deliver them to respondent. The danger in remaining at work was not so obvious or imminent that a reasonably prudent man would have declined to stay there and perform the work assigned to respondent. The time during which respondent remained at work after the repair was made was not unreasonable, and especially so when he was assured by the master that the bolts had been ordered, that the one he was using would answer until the proper bolt arrived,

and that he would get them just as soon as he could. Under these circumstances the authorities are uniform in holding that the respondent is not guilty of contributory negligence, nor did he assume the risk in remaining at his employment. (*Kelley* v. *Fourth of July Mining Co.*, 16 Mont. 484, 41 Pac. 273; *Coulter* v. *Union Laundry Co.*, 34 Mont. 590, 87 Pac. 973; *Johnson* v. *Utah Consol. Min. Co.*, 41 Utah, 142, 125 Pac. 407; *White* v. *Utah Condensed Milk Co.*, 50 Utah, 278, 167 Pac. 656; *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492, Ann. Cas. 1915B, 475, L. R. A. 1915C, 1, 58 L. Ed. 1062, 34 Sup. Ct. Rep. 635, 8 N. C. C. A. 834; reaffirmed in 239 U. S. 595, 60 L. Ed. 458, 36 Sup. Ct. Rep. 180 [see, also, Rose's U. S. Notes]; *Lynn* v. *Omaha Packing Co.*, 88 Neb. 720, 130 N. W. 425, 1 N. C. C. A. 705; *La Fleur* v. *M. A. Burns Lumber* Co., 38 Cal. App. 279, 176 Pac. 58; *Chicago, R. I. & P. Ry. Co.* v. *Rogers*, 60 Okl. 249, 159 Pac. 1132; 26 Cyc. 1209; 18 R. C. L., 696, 699, 701–703.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Plaintiff having recovered a judgment in the district court, defendant has appealed therefrom and from an order denying its motion for a new trial.

For some five years prior to February 5, 1916, plaintiff had been in the employ of the defendant railway company (referred to hereafter as the company), as an engineer operating a stationary gasoline engine to furnish power for hoisting coal into the coal docks of the company and for pumping water into its water-tank at Cushman station, in Musselshell county. The defendant Hudgin was employed in the capacity of a pump repairer. It was his duty to inspect and, when occasion required, to repair the gasoline engines of the company at Cushman and other stations along its line of railway. The igniter or device used to produce combustion adopted by the manufacturer of the Fairbanks-Morse engine, the type in use at Cushman station, is provided with a heavy steel plate elliptical in shape, which fits over the aperture in the head of the cylinder through which the de-

vice is inserted and is held in place by two steel stud bolts. These are made of cold rolled steel and are threaded throughout their entire length. The device is adjusted for service as follows: The bolts are screwed into holes sunk in the face of the cylinder which are properly threaded for that purpose. The plate of the igniter, being provided with holes to correspond with those in the cylinder, is slipped over the projecting ends of the bolts and screwed tight to the face of the cylinder by hexagonal nuts, a gasket of the same size as the plate being first placed between the plate and the cylinder. The office served by the gasket is to prevent the escape of gas between the plate and the face of the cylinder, and to retain the full force of the explosions in the cylinder. The gasket ordinarily used is made of asbestos felt paper covered with thin sheets of copper or interwoven with copper wires. The plates or wires, as the case may be, strengthen the paper so that it will not go to pieces and be blown out by the force of the explosions. At the time of the accident out of which this action arose, the plaintiff, having at hand none of these gaskets, was using others made of the felt paper as a temporary substitute. It was a part of the plaintiff's duty to remove the igniter from time to time to clean the spark points and to make repairs upon the engine with the material he had at hand, when occasion demanded and Hudgin was not present. This frequently required replacement of the gasket, because it would go to pieces when the plate was removed. On November 20, 1915, one of the stud bolts was broken. Plaintiff, having no other for use, substituted temporarily a wrought-iron machine bolt with a round head. This was longer than the stud bolt. The plaintiff used metal washers to take up the extra space between the head of the bolt and the plate, to enable him to screw the bolt tight so that it would hold the igniter in place. To do this it was necessary to use an alligator wrench, because the one furnished for ordinary use would not take hold of the head of the bolt. A short time after these repairs had been made, the defendant Hudgin, who happened to come to Cushman station, examined the engine to ascertain whether it was in repair. He assured the

plaintiff that it was safe, at the same time promising him that he would furnish another bolt to take the place of the machine bolt. Plaintiff had some time before asked him for a supply of gaskets. Hudgin did not thereafter furnish a bolt, though the plaintiff several times requested him to do so, and though he knew that in the condition it then was the engine was not safe; nor did he furnish the gaskets. The machine bolt frequently worked loose and permitted the gas from the explosions to escape.

The plaintiff alleges: "That on the fifth day of February, 1916, and while the plaintiff was in the employ of the defendant Great Northern Railway Company in the capacity aforesaid, and while running and operating said gasoline engine, the said igniter in the head of said engine, suddenly and without warning, and by reason of the dangerous and defective condition thereof as aforesaid, and by reason and owing to the negligence and carelessness of the defendants in failing, neglecting and omitting to furnish and supply the said proper, suitable and necessary repairs for said gasoline engine, and in carelessly and negligently failing, neglecting and omitting to repair the same, became loose and the gasket therein blew out, thereby throwing, with great force and violence, pieces of asbestos, sparks, and other material upon and against plaintiff's head, face, and body, thereby cutting, lacerating, bruising, wounding, burning and injuring plaintiff's head, face, left eye and body." It is further alleged that from the injury so received the sight of plaintiff's left eye became and has remained blurred and almost wholly destroyed; that he has been compelled to undergo several operations to obtain relief from the extreme pain suffered by reason of the injury; that he will finally lose the sight of his eye entirely; and that he has become incapacitated to do any work, whereby his earning power has been entirely destroyed.

The defendants deny all the allegations in the complaint imputing negligence to them, or either of them, and allege as defenses that plaintiff was guilty of contributory negligence, that he assumed the risk, and that his injury was due to the fault of his fellow-servants.

[1] The verdict was for the sum of $17,500. One of the grounds of the motion for new trial was that this verdict was so excessive as to show that it was given under the influence of passion and prejudice. In determining the motion the trial judge expressed the opinion that, while the jury had not been influenced by passion and prejudice, their award was excessive to the amount of $6,500, and ordered a new trial unless the plaintiff should consent that the verdict and judgment be reduced by this amount. Thereupon, the plaintiff having given his consent, the reduction was made and the judgment amended accordingly. Counsel insist that the court erred in not granting the motion without condition.

The evidence discloses that the plaintiff had lost the sight of his right eye many years before the accident; that his only injury was a partial loss of the sight of his left eye and the incidental pain and suffering consequent to such an injury; that he was sixty-seven years of age and had an expectancy of life of only ten years; that he was earning at that time $50 per month; and that for the five preceding years he had earned not to exceed an average of this sum per month. Under these circumstances we think the verdict was much in excess of just compensation for the injury. Assuming that plaintiff should live for the full period of his expectancy of life, retaining his capacity for service in the same or other equally remunerative employment unimpaired, and that the course of his employment would not be interrupted by sickness or other cause, the gross amount of his earnings for the entire period of his expectancy of life would be $6,000, without any reduction in consideration of his having the present use of this sum instead of his having it paid to him in deferred monthly installments. In addition to this he was awarded $11,500 for pain, suffering, etc. The two sums together, invested at interest at the rate of six per cent per annum, would enable him to secure an income of nearly double the amount of his gross annual earnings, and at his death to leave the principal to descend to his heirs. Even the sum to which the trial court reduced the award, invested at the same rate of interest, would

secure an annual income greater than the amount of his gross earnings. In the absence of evidence disclosing unusual pain and suffering by plaintiff, and outlay for medical and surgical treatment (and there is no evidence on this point), we think the amount awarded to him might properly have been further reduced. The office of juries in such cases is to compensate the living plaintiff for the loss sustained by him, and not to endow his heirs. We are of the opinion, however, that the excessiveness of the award is attributable to miscalculation by the jury under the instruction submitted to them rather than to feelings of passion and prejudice. This, we think, will be apparent when we consider the instruction as to the use the jury might make of annuity and mortality tables in determining the amount they might allow plaintiff to cover the wages of an attendant, in connection with the evidence on that subject, in case he should lose the sight of his eye entirely. In this connection the court submitted to the jury the following instruction: "If you find for the plaintiff, and should further find that the capacity of the plaintiff to labor or earn money has been reduced by reason of his injuries, you should award him such sum on that account as will purchase an annuity equal to the difference in the amount he could earn annually, in view of his injuries, and the amount he could have earned annually were it not for his injuries, taking into consideration, however, the diminution of his earning capacity due to causes other than the injury itself, such as advancing age, the apparent present state of plaintiff's health, the apparent permanence or lack of permanence of his disability, his habits of life, and the possibility that his employment would have been continuous, and the like." Nowhere else in the instructions was this subject adverted to. Counsel for the defendants objected to the giving of the instruction on the grounds (1) that it laid down an absolute standard by which the jury were required to fix the amount of recovery for loss of earnings, and (2) that it authorized a recovery of the full amount of such annuity, even though the injury was caused in part by plaintiff's contributory negligence, and did not permit any diminution by the jury of this amount in proportion to the negligence attributable to him.

The instruction was taken, substantially, from the case of *Moyse* v. *Northern Pacific Ry. Co.*, 41 Mont. 272, 108 Pac. 1062; the only addition made to the one there considered being a more particular enumeration of the conditions to be taken into account by the jury in connection with the mortality and annuity tables in fixing the amount of damages. Counsel for the plaintiff insist that this court expressly approved the instruction as given in that case. A careful reading of the opinion in its entirety will demonstrate that counsel are in error. The court did say that, as an abstract statement of the law, no fault was to be found with the instruction, but proceeded to point out that in other instructions given in connection with it the trial court carefully called the attention of the jury to the other conditions in evidence which they should consider, and the use they might make of these tables, at the same time telling them that these should not be taken as an absolute standard for their calculations, but should be used by them as a guide only, so far as the facts disclosed by the evidence corresponded to those from which the tables were compiled. The conclusion was reached that the instructions on the subject as given, taken together, embodied the rule which had theretofore been announced by this court in *Robinson* v. *Helena Light & Ry. Co.*, 38 Mont. 222, 99 Pac. 837, and the other cases cited. A careful examination of the opinion would have made it clear that this court merely held the instruction not misleading when read in connection with the other instructions which explained or limited the probative force the jury should give to this character of evidence.

Mortality tables are competent evidence to aid the jury in [2, 3] determining the probable duration of plaintiff's life, and hence to aid them, by comparing his earnings before and after the injury complained of, to ascertain the amount which will compensate him for his loss by reason of the impairment of his earning capacity. If the impairment is permanent, the loss will continue throughout life; and hence his damages should be fixed at such a sum as will reasonably compensate him for his loss, making allowance for any diminution in his earning capacity

which may be due to causes other than the injury, such as advancing age, the apparent state of his health at the time of the injury, his habits of life, the possibility that he might or might not have been engaged in continuous remunerative employment, and the like. Even with the aid of these tables, therefore, the finding of the jury must necessarily be based upon considerations more or less speculative in character, and they must be left to exercise their discretion unlimited by any fixed standard; for, as we said in *Jones* v. *Shannon*, 55 Mont. 225, 175 Pac. 882: "There is no standard of measurement by which to determine the amount of damages to be awarded other than the intelligence of the jury, made up of impartial men governed by a sense of justice. To the jury, therefore, is committed the exclusive task of examining the facts and circumstances of each case and valuing the injury and awarding compensation in the shape of damages." To the same effect is the statement in *White* v. *Chicago, M. & St. P. Ry. Co.*, 49 Mont. 419, 143 Pac. 561.

The office served by annuity tables is to furnish the jury a [4] basis by which they may ascertain the sum in cash which will be deemed adequate compensation for the loss; in other words, a basis by which they may ascertain the present worth of the several sums which would otherwise have been received by him in the form of deferred payments, and the earning power of money in the general community in which the injury occurred. These tables are based upon calculations by insurance companies as to the rates at which they may safely sell annuities; the selling price being dependent upon the prevailing rate of interest in that general locality—the higher the rate, the cheaper the price at which an annuity may be sold. As in the case of mortality tables, they cannot be accepted as an absolute basis for this purpose, but only as a guide to the jury in the exercise of an intelligent discretion in determining the final result. When, therefore, these tables have been admitted in evidence, as they were here, the court should not in its instructions leave the jury to infer that they are to serve as an absolute standard.

At the settlement of the instructions counsel for the defendants, besides objecting to the instructions as above stated, offered [5] one which, while not as clear and explicit as it might have been, stated generally the office of this character of evidence. The court refused to give it, thus leaving the jury to infer that they were at liberty, if they chose, to regard the tables as furnishing an authorized and definite standard by which they might fix their award. Upon the evidence it was a controverted question as to what the extent of the jury was. The instruction, standing alone and without explanation or limitation in its application by any other, was, in our opinion, misleading, and therefore prejudicially erroneous.

We may properly notice here the evidence referred to above, [6] touching the expense plaintiff might be required to incur to secure an attendant. Dr. Lewis, called as an expert witness by the plaintiff, testified as to the condition of plaintiff's eye at the time of the trial, and expressed the opinion that the injury was permanent and could not be remedied or cured by medical treatment. Being asked if he was familiar with the cost of procuring an attendant to care for a blind man, and having answered in the affirmative, he was then permitted to state, over the objection of the defendants, that it would cost $100 per month. Objection to this evidence on the ground, among others, that it was incompetent and immaterial, was overruled. The ruling was erroneous. Though at the time of the trial the vision of plaintiff's eye was partially obscured, it was clear enough to enable him to care for himself and to go where he chose without attendance. Dr. Lewis had also expressed the opinion that the cause of the defective condition was hemorrhage of the vitreous, produced by the accident, and that a recurrence of it would likely produce total blindness. On this subject, however, he expressed no other opinion. Whether or not, therefore, plaintiff would ever need an attendant was left to be inferred by the jury, not from facts or opinions in the evidence tending to show a reasonable probability that total blindness would be the result, but altogether as a matter of speculation as to what might or might

not occur in the future. From this point of view the evidence was incompetent. It was also prejudicial, for it named a definite sum which the jury might add to the amount awarded for other elements of damage, and doubtless they made it the basis of their findings in this behalf.

In a case in which the plaintiff has become totally blind, or [7] there is evidence tending to show a reasonable probability that the injury will produce this result, it is competent for the jury, in assessing the damages, to take into consideration the fact that he will need care and attention by others, if there is evidence showing with reasonable certainty that such need will arise and when it will arise. (*Bell* v. *Milwaukee Ry. & L. Co.*, 169 Wis. 408, 172 N. W. 791.) Even so, the amount they should allow in this behalf rests in their discretion under proper instructions. In our opinion, the excessive amount of the verdict is to be accounted for in part by the admission of this evidence.

There seems to have been some confusion in the minds of the court and counsel as to whether this action was brought and was [8] triable under the statute (Laws 1911, Chap. 29), or was an action at common law. The statute is, in substance, a copy of the federal Employers' Liability Act, as it stood prior to the amendment of 1910 (35 Stats. at Large, 65 [8 Fed. Stats. Ann., 2d ed., p. 1208, *etc.;* U. S. Comp. Stats., secs. 8657–8665]). (*Hall* v. *Northern Pac. Ry. Co.*, 56 Mont. 537, 186 Pac. 340.) Section 1 of the Act declares the railway company liable to the employee for any injury received by him through the negligence of any officer or other employee engaged in the operation of the railway, or where the injury occurs by reason of any defect or insufficiency of any engine, car or other appliance. In case of the death of the employee, instantaneous or otherwise, the liability ceases except as to the personal representative for the benefit of the members of the family, or to the parents, or to the next of kin who are dependent upon him. Section 2 abolishes the defense of contributory negligence, and merely makes such negligence on the part of the employee a matter which may be shown in mitigation of the damages. In addition, it declares

that the employee shall not be held guilty of contributory negligence in any case where the employer has violated any provision of law enacted for the safety of employees, which has contributed to the injury or death of the employee. Section 3 abolishes the defense of assumption of risk in any case where the dangerous condition out of which the injury has arisen is due to the negligence of the employer. Section 4 declares null and void any contract, rule or regulation, the purpose or intent of which is to enable the employer to exempt itself from liability created by the Act.

Clearly, the purpose of the legislature in enacting this statute was to substitute for the benefit of the employee of a railway company the action it provides for in place of the action at common law, and at the same time, in case of his death, to create a new cause of action in favor of the dependents named for the pecuniary loss suffered by them. (*Hall* v. *Northern Pac. Ry. Co., supra; Michigan Central R. R. Co.* v. *Vreeland*, 227 U. S. 59, Ann. Cas. 1914C, 176, 57 L. Ed. 417, 33 Sup. Ct. Rep. 192; *St. Louis, I. M. & S. R. Co.* v. *Craft*, 237 U. S. 684, 59 L. Ed. 1160, 35 Sup. Ct. Rep. 704 [see, also, Rose's U. S. Notes].) Its provisions cover the whole subject of the liability of railway companies for injury to or death of an employee, whether caused by the negligence of an agent who occupies the position of a vice-principal or of any other employee. If there were any doubt upon the subject, this would be set at rest by sections 6213 and 6214 of the Revised Codes, which declare:

Section 6213: "In this state there is no common law in any case where the law is declared by the Code or other statute."

Section 6214: "The Code establishes the law of this state respecting the subjects to which it relates." (*Marron* v. *Great N. Ry. Co.*, 46 Mont. 593, 129 Pac. 1055; *In re Beck's Estate*, 44 Mont. 561, 121 Pac. 784, 1057.)

It is true that so far as the injured employee is concerned the [9] statute does not change in any particular the form of the statement of the plaintiff's cause of action; but it does require all the other pleadings to be formulated so as to present only

the issues arising upon defenses permitted by it, including the matter which may be alleged in mitigation of the damages. We have ventured these comments upon the statute because a new trial must be ordered on account of the errors discussed above, to the end that the court and counsel may avoid the confusion into which they fell at the former trial.

The second objection to the instruction was properly overruled, for the reason that there was no evidence, either in plaintiff's case or in that introduced by the defendants, tending to show that the plaintiff was guilty of contributory negligence in any respect.

In submitting the instructions the court seems to have assumed [10] that the issue of contributory negligence was in the case and to be determined by the jury; for, while it did not explicitly define for the jury the triable issues, it said to them: "The issues in this case are set forth in the pleadings which are herewith submitted to you." At the settlement of the instructions, counsel for defendants requested the court to submit the following, which was refused: "You are instructed that the burden of the issue of contributory negligence is on the plaintiff to show whether or not his contributory negligence, if any, contributed to cause his damage, if any, and, if so, the extent of the contribution." This ruling is assigned as error. The refusal was correct because, as stated above, there was no evidence from which the jury could find plaintiff guilty of contributory negligence in any respect. Furthermore, prior to the enactment of the Employers' Liability Act, *supra*, the rule was established in this jurisdiction that the burden was upon the defendant to plead and prove the defense of contributory negligence. The only exception to this rule was: "Where plaintiff's own act is the proximate cause of his injury, he must allege and prove that in doing the particular act he was moved by those considerations for his own safety which would actuate a reasonably prudent person, similarly situated, to do as he did." (*Lynes* v. *Northern Pac. Ry. Co.*, 43 Mont. 317, Ann. Cas. 1912C, 183, 117 Pac. 81.) The statute does not change the rule; for, though under

[11] the rule of comparative negligence declared by it contributory negligence is only a partial defense, still the burden to prove it is upon the defendant. Section 6550 of the Revised Codes provides: "A partial defense may be set forth, as prescribed in the last section; but it must be expressly stated to be a partial defense to the entire complaint, or to one or more separate causes of action therein set forth. Upon a demurrer thereto, the question is, whether it is sufficient for that purpose. Matter tending only to mitigate or reduce damages, in an action to recover damages for the breach of a promise to marry, or for a personal injury, or an injury to property, is a partial defense, within the meaning of this section." In the recent case of *McKim* v. *Beiseker*, 56 Mont. 330, 185 Pac. 153, after considering this and the preceding section, this court said: "If a defendant does not wish to offer evidence in mitigation or reduction of damages, then he may omit from his answer any partial defense under which such evidence is admissible. But if he desires to offer evidence at the trial of matter tending to mitigate or reduce damages, then the answer, to make such evidence competent, must contain a plea of such matter as a partial defense."

During the trial counsel for the defendants requested the [12] court to permit physicians present in the courtroom to make a physical examination of the plaintiff in the presence of the jury. The request was denied. They afterward requested instructions which would have told the jury, in effect, that the refusal of the plaintiff to submit to the examination at the request of counsel made in open court, together with the circumstances, might be considered by them and given such weight as they might in their discretion deem proper. It was held in *May* v. *Northern Pac. Ry. Co.*, 32 Mont. 522, 4 Ann. Cas. 605, 70 L. R. A. 111, 81 Pac. 328, that the court could not, in the absence of legislation, compel the plaintiff to submit to a physical examination. The propriety of the rule announced in that case is conceded by counsel for defendants; but they insist that the request and refusal should have gone to the jury under proper instructions, to be considered by them as competent evidence on the

theory that, inasmuch as the episode had taken place in the presence of the jury, they should be permitted to consider it as evidence which the plaintiff had in his possession but refused to disclose. In other words, the plaintiff having refused to submit to the examination, which would have resulted in bringing to the knowledge of the jury stronger and more satisfactory evidence of the condition of his eye at the time, the other evidence on that point produced by him should be viewed with distrust. (Rev. Codes, sec. 8028.) The contention is wholly without merit. The defendants had no right to make the demand. The plaintiff had a right to refuse to comply with it. Though the requested instructions would not have told the jury explicitly that they should view with distrust plaintiff's evidence in this behalf, it is entirely clear that counsel could have had no other purpose in making the request than to put themselves in position to argue to the jury that plaintiff's evidence was untrustworthy. Counsel in this way sought to put the plaintiff at a disadvantage before the jury, notwithstanding they knew that under the decision in *May* v. *Northern Pac. Ry. Co., supra*, their demand was improper.

Counsel devote some considerable space in their brief to an argument in an effort to show that plaintiff was guilty of contributory negligence, or, in any event, assumed the risk of the unsafe condition of the engine. What has been said above disposes of the contention as to contributory negligence.

It is said that the evidence shows that plaintiff continued to [13] use the makeshift bolt from November 20, 1915, when the stud bolt was broken, to February 5, 1916, the time of the accident, and that in doing so he did not rely on Hudgin's promise to furnish a new one. It is sufficient to say in this connection that the condition of the engine was due to the negligence of Hudgin in failing to make proper repairs when it was called to his attention, which was, in fact, done almost immediately after the stud bolt was broken. In the sense that he permitted this condition to continue, it arose by reason of his negligence. From this point of view, the defense of assumption of risk was not

available to the defendants. Section 3 of the statute, *supra*, expressly provides that the injured employee "shall not be deemed to have assumed any risk incident to his employment when such risk arises by reason of the negligence of his employer or of any person in the service of such employer." Assuming, however, [14] that this provision of the statute does not apply to the facts in this case, still the question whether the plaintiff assumed the risk by remaining in the employment of the company for so long a time was a question to be determined by the jury.

The judgment and order are reversed and the cause is remanded for a new trial.

Reversed and remanded.

ASSOCIATE JUSTICES HOLLOWAY, HURLY and MATTHEWS concur.

MR. JUSTICE COOPER, being absent, takes no part in the foregoing decision.

BOSANATZ, APPELLANT, *v.* OSTRONICH, RESPONDENT.

(No. 4,076.)

(Submitted January 12, 1920. Decided February 2, 1920.)

[187 Pac. 1009.]

Trusts — Mines and Mining — Appeal and Error — Evidence — Sufficiency — Findings — Jury Trial.

Trusts—Findings—Evidence—Sufficiency.

1. Evidence examined, in an action to have defendant decreed a trustee, for the use and benefit of plaintiff, of one-half of mining property, deed to which had been taken in the name of the brother of defendant, with intent to cheat and defraud plaintiff, and by him transferred to defendant, and *held* sufficient to support the findings of the court in favor of defendant.

Equity—Findings—When Conclusive.

2. The findings of the district court in equity cases will never be reversed, except where the evidence clearly preponderates against them.

Same—Jury Trial.

3. In an equity case the trial judge may, but is not bound to, call a jury; where a jury is called, he may disregard their findings and substitute his own.

Trustees—Relationship Nonexistent, When.

4. Where defendant promised to lend financial aid to plaintiff should the latter find a mine property on which he could secure a lease, and pursuant to such agreement plaintiff disclosed to defendant such knowledge as he had concerning two claims, but neither claim was leased, defendant was under no liability to account as trustee to plaintiff for a half interest in other claims thereafter purchased by defendant.

Appeal from District Court, Madison County; Jos. C. Smith, Judge.

SUIT by George Bosanatz against Mike Ostronich. Judgment for defendant and plaintiff appeals. Affirmed.

Messrs. Maury, Templeman & Davies, Mr. Chas. A. Wallace, and *Mr. M. M. Duncan,* for Appellant, submitted a brief; *Mr. J. O. Davies* argued the cause orally.

We contend this is an action for the recovery of specific real property under section 6724, Revised Codes. To determine this question, the sole concern of the court is to determine the main purpose of the action. This question is not at all determined by the nature of the action or by the relief demanded, and is determined by the allegations of the complaint and the object sought. The allegations of this complaint is the deraignment of plaintiff's title to the real property, and the object sought is to have this title of this one-half interest in the real property described in the complaint to be adjudged to be in the plaintiff. (*Atkinson* v. *Crow etc. Min. Co.,* 80 Kan. 161, 18 Ann. Cas. 242, 39 L. R. A. (n. s.) 31, 102 Pac. 50, 106 Pac. 1052; *Mogollon Gold & Copper Co.* v. *Stout,* 14 N. M. 245, 91 Pac. 724; *Carlisle Packing Co.* v. *Deming,* 62 Wash. 455, 114 Pac. 172; *Burleigh* v. *Hecht,* 22 S. D. 301, 117 N. W. 367.) If the plaintiff, as a matter of right, was entitled to a trial by jury, then there can be no question but that the findings of the jury were binding upon the trial court. (16 Cyc. 426.)

If the court should disagree with us upon this question as to an absolute right to trial by jury, and should hold that the right to trial by jury in this case was merely discretionary with the trial court, nevertheless the action of the trial court in rejecting

the findings of the jury in this case was error. Upon this proposition we desire again to call the court's attention to 16 Cyc. 423. As to when it is error for a trial court to reject the findings of fact of a jury in an equity case where the party is not entitled as a matter of right to a trial by jury, that is, where the findings of the jury are merely advisory, we seem to have two lines of decision—one line of decision, to use the language of the supreme court in the state of Oregon, speaking of the verdict of the jury in the case of *Swegle* v. *Wells*, 7 Or. 222: "And while not conclusive upon the court, it should not be set aside unless clearly against the evidence"; the other line of decision is to the effect that if the evidence is equi-preponderant, or nearly so, then it is error for the trial court to reject the findings of the jury. (Sec. 8054, Rev. Codes; *Miller* v. *Wills*, 95 Va. 337, 28 S. E. 337; *Peckham* v. *Armstrong*, 20 R. I. 539, 40 Atl. 419; *Morawick* v. *Martineck*, 128 Ky. 155, 107 S. W. 759; *McDaniel* v. *Marygold*, 2 Iowa, 500, 65 Am. Dec. 786; *Carter* v. *Jeffries*, 110 Va. 735, 67 S. E. 284; *Walton Brick Co.* v. *Anderson etc. Machine Works*, 142 Ky. 274, 134 S. W. 136; *Swegle* v. *Wells*, 7 Or. 222; *Glenn* v. *Crescent Coal Co.*, 145 Ky. 137, 37 L. R. A. (n. s.) 197, 140 S. W. 43; *Humphrey* v. *Ward*, 74 N. C. 784; *Orgain* v. *Ramsey*, 3 Humph. (Tenn. 580); 10 R. C. L. 584.)

As far as this case is concerned, under either rule the action of the trial court in rejecting the findings of the jury was error. When the defendant induced the plaintiff to give to him his (plaintiff's) valuable information; to give to him the fruits of plaintiff's ten years of prospecting, by ceasing to get others to back him in acquiring this property; by taking the defendant to Goodrich gulch in order that the defendant might examine the property and determine for himself that it was of such value as to justify him in putting his money into it, then and at that very moment he became bound by the terms of his own contract, and is estopped to deny it. Under the terms of the contract, when he put his money into this property he did so for the benefit of the plaintiff. He became the agent of the plaintiff. He was the agent of the plaintiff in securing the property. To take

the title in his own name or secure the property for himself was a breach of his contract with the plaintiff. Under these facts, a court of equity is bound to decree that he holds the legal title thereof in trust for the plaintiff. Under this defense of the defendant it would be unconscionable to allow him to retain the ownership or legal title to the Anderson property. The courts of this country have, with great unanimity held, that persons in the position that the defendant placed himself in, by his own mouth at the trial of this case, hold the legal title of the property in trust for the benefit of the party defrauded, for the benefit of the person who would have had title thereto had the agreement been carried out. (*Settembre* v. *Putnam*, 30 Cal. 490; *Moritz* v. *Lavelle*, 77 Cal. 10, 11 Am. St. Rep. 229, 18 Pac. 803.) In the latter case it is said: "In *Settembre* v. *Putnam*, 30 Cal. 490, it was held that where mining partners, under a verbal agreement, claim and develop a lode upon the land of another, and authorize one of their number to buy the claim for the benefit of all, and he procures a deed in his own name, he holds the legal title to the interest of his partners in trust for them." (*Kroll* v. *Coach*, 45 Or. 459, 78 Pac. 397; *Butterfield* v. *Nogales Copper Co.*, 9 Ariz. 212, 80 Pac. 345; *Walker* v. *Bruce*, 44 Colo. 109, 97 Pac. 250; *Crosby* v. *Clark*, 132 Cal. 1, 63 Pac. 1022; *Wright* v. *Smith*, 23 N. J. Eq. 106.)

Messrs. Rodgers & Gilbert, Mr. Lyman H. Bennett and *Mr. W. B. Rodgers*, for Respondents, submitted a brief; *Mr. Harry B. Rodgers* and *Mr. H. W. Rodgers*, of Counsel, argued the cause orally.

The universal rule is that wherever a title is sought to be asserted by one party in derogation of the written title standing in the name of another, upon whatever grounds the title is asserted, whether by means of an oral agreement to convey or a resulting or constructive trust, the evidence showing the same must be clear, convincing, unambiguous and, as stated by most of the cases, the same must be proved beyond a reasonable doubt. (*Great Falls W. W. Co.* v. *Great Northern Ry. Co.*, 21 Mont. 487, 59 Pac. 963; *Lewis* v. *Patton*, 42 Mont. 531, 113 Pac. 745;

Howland v. *Blake,* 97 U. S. 624, 24 L. Ed. 1027 [see, also, Rose's U. S. Notes]; *Chambers* v. *Emery,* 13 Utah, 374, 45 Pac. 192; *Satterfield* v. *Malone,* 35 Fed. 445, 1 L. R. A. 35.)

In the following cases, where the evidence was equally balanced, relief was refused: *Luscombe* v. *Peterson,* 173 Mich. 165, 138 N. W. 1057; *Hunter* v. *Field,* 114 Ark. 128, 169 S. W. 814; *La Cotts* v. *La Cotts,* 109 Ark. 335, 159 S. W. 1111; *Pike* v. *Pettus,* 71 Ala. 98; *Stephens* v. *St. Louis Union Trust Co.,* 260 Ill. 364, 103 N. E. 190; *Croup* v. *De Moss et al.,* 78 Wash. 128, 138 Pac. 671; *Crane* v. *Reed,* 172 Mich. 642, 138 N. W. 223.

The statute of frauds is applicable to this case. (See *Ryan* v. *Dunphy,* 4 Mont. 352, 1 Pac. 710; *Ducie* v. *Ford,* 8 Mont. 238, 19 Pac. 414; *Prince* v. *Lamb,* 128 Cal. 120, 60 Pac. 689; *Levy* v. *Brush,* 45 N. Y. 591; *McKinley* v. *Lloyd,* 128 Fed. 519; *Purcell* v. *Miner,* 4 Wall. 513, 18 L. Ed. 435 [see, also, Rose's U. S. Notes].)

MR. JUSTICE MATTHEWS delivered the opinion of the court.

The appellant alleged that prior to March 8, 1914, he had become familiar with the value and quantity of ore disclosed in the Elenora lode claim, containing ore of a value in excess of $35,000, of which there was partly blocked out and exposed ore of the value of more than $10,000; that on said date he disclosed his knowledge to respondent, and that they then entered into an oral agreement to go to the claim, make an examination, and, if desirable, make an effort to purchase the claim, the respondent to advance $1,000 or so much thereof as should be necessary to make the first payment; that they would then operate the property, repay respondent, and complete the payments on the mine out of the proceeds from ore shipped; that on April 27, 1914, they did visit and examine the mine, under their agreement, and thereafter purchased the same, with the Blondie Britannica and Minnie Montreal claims, for the sum of $4,500; that under the agreement appellant was to have charge of the mining operations, while respondent was to look after the outside affairs; that

appellant performed his part of the agreement until October, 1914, when he became sick; that ore of the value of more than $35,000 was extracted and shipped, and the purchase price fully paid from the proceeds, but that the deed was taken in the name of Joseph Ostronich, a brother of the respondent, secretly, with the intent to cheat and defraud appellant; and that Ostronich has since transferred the property to respondent. The prayer for relief is that respondent be adjudged to hold the one-half interest therein in trust for appellant, an accounting required, and the respondent directed to convey the one-half interest to appellant. The allegations being denied, the cause was tried to the court sitting with a jury. The jury found in favor of appellant, but the judge rejected the findings of the jury, and made general and special findings in favor of respondent, and entered judgment thereon. This appeal is from the judgment.

1. The first contention of appellant is that the findings of the [1] court are not supported by the evidence, and are contrary to the decided weight and preponderance thereof. The testimony of appellant in his own behalf is ample, if uncontradicted, to prove all the allegations of his complaint; he was substantially corroborated by his brother, Mike Bosanatz, and, in some particulars, by two or three other witnesses. There are, however, a number of contradictory statements in his testimony. Two witnesses offered for the purpose of impeachment testified to statements made at other times contradictory of his testimony on the stand. In addition, Andrew Anderson, the grantor of the Elenora and joint grantor of the other claims mentioned, testified that at the time appellant claimed to have been familiar with the property the claim had not been discovered, no vein disclosed, and, at best, there was known to be upon it float and small holes and cuts, made by him in an effort to locate the vein from which the float came. Anderson further testified that the conversation related by appellant was held in the summer-time, before he discovered the Elenora, and referred only to the two other claims.

Bosanatz, having testified that he and Ostronich went to Goodrich gulch for the purpose of examining the Elenora or the Anderson property; that when they arrived, they went directly to the Elenora, examined it, took samples, and attempted to buy the property. Anderson testified that when the two men came to his place they had dinner, and proceeded to the Carolina, a claim owned by Senator Hoffman, of Bozeman, and did not go to the Elenora until the next day, and then only when he invited them, they being about to depart, to take a look at his property; that Ostronich asked if he could take samples, and was given permission, and, on being told that he (Anderson) could not do anything with the property at present on account of an attempt to jump the claim, said that he would return later; and that Ostronich did return on two subsequent occasions, finally purchasing the property.

Ostronich flatly contradicts all of the testimony of appellant concerning any agreement as to the Elenora, or any conversation on the subject, but states that, having on several occasions told appellant that if appellant could secure a lease where he could make anything, he (Ostronich) would help him financially, at least to the extent of $1,000. Respondent further testified that appellant told him of the Carolina and of the Argenta claims, in the vicinity of the Elenora; that he wrote, in appellant's name, to Senator Hoffman concerning a lease and, being informed that the owners might operate the claim, but, if they did not, they would advise him further, appellant and respondent went to inspect the two claims, lying about twenty miles from where they were working. On reaching the Argenta they found men working on it, and appellant said that, as the claim was being operated, it would be useless to try for a lease on it; that they examined the Carolina, and he advised appellant that it was pretty well worked out, but that there was one showing where a man might, by hard work, make wages. Returning to Anderson's cabin they spent the night, and the occurrences of the next day were as Anderson had stated them.

The testimony as to appellant's management of the mine was conflicting and unsatisfactory. The evidence disclosed the fact that appellant was singularly uninterested and did not seek information as to the terms of the lease and bond, the expenses of operation, the returns from the shipment of ore or the reason why the title was taken in the name of Joseph Ostronich, when he discovered the fact. He accepted small payments, approximately amounting to the wages he earned, and which respondent testified were in payment of his wages, but which appellant contends were his portion of net proceeds, without inquiry as to what the proceeds of the mine were.

There is a sharp conflict in the testimony. The evidence would seem to be sufficient to support either party's contention, considering merely the cold record; but the trial judge had the advantage of seeing the witnesses on the stand and noting their demeanor while testifying, and their appearance on the stand.

Where the evidence is conflicting in an equity case, the findings [2] of fact by the trial judge rest upon the same principle as the verdict of a jury. (*Ingalls* v. *Austin*, 8 Mont. 333, 20 Pac. 637.) This court has held repeatedly that, where there is a substantial conflict in the evidence, the supreme court on appeal will not disturb the verdict of the jury on the ground of alleged insufficiency of the evidence. (*Murphy* v. *Cooper*, 41 Mont. 72, 108 Pac. 576; *Previsich* v. *Butte Electric Ry. Co.*, 47 Mont. 170, 131 Pac. 25.)

Indeed, we may go much further than this, and declare that the findings of the district court in equity cases will never be reversed except where the evidence clearly preponderates against them. This doctrine has been declared by this court in a long line of decisions, from *Story* v. *Black*, 5 Mont. 26, 51 Am. Rep. 37, 1 Pac. 1, the first case reported in the Pacific Reporter system, down to *Boyd* v. *Huffine*, 44 Mont. 306, 120 Pac. 228, and *Winslow* v. *Dundom*, 46 Mont. 71, 125 Pac. 136.

2. Appellant contends that the rejection of the jury's findings [3] constitutes error, for the reason that appellant was entitled to a jury trial, and therefore its findings could only be set aside

for such cause as would warrant like action on a verdict, *or* if this position be not tenable, then, under the circumstances, the findings were entitled to great weight, and were not to be lightly disregarded.

This contention is without merit, and has long since been foreclosed by this court. In the case of *Short* v. *Estey*, 33 Mont. 261, 83 Pac. 479, in which the facts were similar and the relief prayed for the same as here, this court said: "The cause of action stated in the complaint is one of purely equitable cognizance. There is no issue presented of such a character as would entitle any of the parties to a trial by jury, according to the usual course of law. The court, then, was not bound to call a jury; and, if it had submitted the case for findings, it would not have been bound by them. In such cases the findings may aid the conscience of the judge, but may not control his judgment. The findings and judgment are his. If, when the jury has made findings, the judge is not satisfied with them, he may disregard them, and so find as to satisfy his own conscience."

In *Wetzstein* v. *Largey*, 27 Mont. 212, 70 Pac. 717, the court held that "Ultimately the findings and decree based thereon must be regarded as emanating from the judge, and the correctness of the result must be determined by a review of the action of the judge, without regard to the findings of the jury. This court has so held in many cases."

3. We find no error in the ruling of the court on the questions set out in specifications Nos. 17 and 18.

4. Appellant propounds the question, "What are the rights of [4] the plaintiff under the defense of the defendant?" to which the answer is: The only property alleged by appellant to have the subject matter of the trip to Goodrich gulch is the Anderson property, the Elenora and companion claims. Had the court found that respondent had agreed, generally, to finance appellant in the operation of any property he might secure, by purchase or lease, and that, in visiting Goodrich gulch respondent was acting by reason of the disclosures made by appellant concerning the Elenora claim, as appellant contends, clearly a fidu-

ciary relation would have resulted. But the evidence tended to show, and the court found, that the visit was not pursuant to any such disclosure; that at the time of the conversation between these two men the Elenora was not discovered, and no vein was disclosed therein. Taking, then, the theory of the defense, to discover, what right, if any, appellant had thereunder, we find that respondent had promised to lend financial aid to appellant, if necessary, should he find a property on which he could secure a lease; that pursuant to such agreement appellant disclosed to respondent such knowledge as he had concerning the Carolina claim and the Argenta claim in the vicinity of the Anderson property; that these two claims were the subject matter of the visit to Goodrich gulch; but on visiting the claims appellant himself found that the Argenta was being operated and consequently could not be leased and was advised by respondent that on the Carolina a man could only make wages by hard work and the project of leasing that claim was abandoned. Having gone as far as appellant desired regarding the only claims suggested by appellant, respondent was released from responsibility, at least until appellant should suggest some other claim.

The subject matter of the contract being disposed of, appellant had no right "under the defense." This also disposes of the discussion concerning "part performance" under the contract, if any, disclosed in the defense.

The judgment of the district court of Madison county is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

ON MOTION FOR REHEARING.

(Decided February 28, 1920.)

MR. JUSTICE MATTHEWS delivered the opinion of the court.

1. Appellant's petition for rehearing urges that the court applies an obsolete rule for the determination of equity cases, quoting a portion of the rule laid down by the court, which appellant admits was the rule in the jurisdiction prior to the enactment of section 6253, Revised Codes, but contending that a different rule applies since the enactment of that section, and that it has been so declared in the following cases: *Stevens* v. *Trafton,* 36 Mont. 520, 93 Pac. 810; *In re Colbert's Estate,* 51 Mont. 455, 153 Pac. 1022; *Barnard Realty Co.* v. *City of Butte,* 55 Mont. 384, 177 Pac. 402; and *Lowry* v. *Carrier,* 55 Mont. 392, 177 Pac. 756. The authorities cited deal with an entirely different phase of the consideration of equity cases, and do not relate to the rule laid down in the line of authorities cited in the opinion.

It is true that in equity cases, since the enactment of the section referred to, the court must review the questions of fact as well as those of law, and determine the case on its merits, to the end that equity cases might be thus finally disposed of on their merits, without the necessity of successive trials on the same state of facts. As was said by this court in *Stevens* v. *Trafton, supra*: "The evident purpose of the legislature in passing the law above quoted was undoubtedly to expedite the entry of final judgment in cases where the parties were not entitled to trial by jury; to put an end to litigation, and avoid the necessity of new trials involving expense and the contingencies incident to delay. * * * To the end, therefore, that this court might enter final judgment in these equity causes, it is provided that the court shall, on appeal, determine the same on the merits, unless for good cause a new trial or the taking of further evidence is ordered." This rule, however, goes no further than to require that the court shall review the questions of fact as well as those

of law, and dispose of the cause on its merits, and does not affect the rule governing the court in the consideration of the evidence. If, on a review of the questions of fact, it does not appear that the evidence clearly preponderates against the findings of fact by the trial court, the appellate court will not disturb those findings. This is the rule laid down in the opinion in this case, and is supported by all the opinions of this court in equity cases, as stated in the opinion, from *Story* v. *Black*, the first case reported in the Pacific Reporter, down to the present time.

2. While it is true the trial court made no specific finding that the Anderson property was not the subject matter of the contract or agreement between the parties, it so found in effect, and such implied finding is abundantly supported by the evidence. The court carefully considered all of the evidence; and while, as pointed out in the petition for a rehearing, there was evidence in the case to support a contrary view, the trial court had the advantage of seeing the witnesses on the stand and observing their demeanor, and was at liberty to reject the testimony of the one set of witnesses and accept that of the other, and this court will not, under such circumstances, set its opinion of the evidence up as against that of the trial court.

3. It is suggested that it has been the universal custom of appellate courts, in deciding vital questions of fact, to fairly set forth, in the opinion, the substance at least of the evidence. This we feel has been done in this case, in so far as the fact conditions are necessary to an intelligent opinion; no good purpose could be subserved in cumbering the record with the mass of testimony set out in the petition for rehearing, as pertinent in this respect.

The petition is denied.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

GERVAIS, APPELLANT, *v.* ROLFE, RESPONDENT.

(No. 4,466.)

(Submitted January 13, 1920. Decided February 4, 1920.)

[187 Pac. 899.]

Election Contests—Evidence—Burden of Proof—Costs—Witnesses—Credibility.

Election Contest—Illegal Votes—Evidence.

1. Where it appears in an election contest that a voter was not a legal one, any person with the requisite knowledge may testify as to the person for whom he voted.

Same—Illegal Votes—Circumstantial Evidence.

2. Where it does not appear from direct testimony for what candidate an unqualified voter voted, the fact may be shown by circumstantial evidence.

Same—Evidence.

3. A voter who does not remember for whom he voted may be asked for whom he intended to vote, as a circumstance tending to raise a presumption for whom he did vote.

Same—Illegal Votes—Evidence—Admissibility.

4. An unqualified voter who could not read or write English was properly permitted to testify that one of the election judges read the names on the ballot to him; that whenever the name of a candidate for whom he wished to vote was read, he placed a cross before the name; that he wanted to vote for contestant; that the election judge told him where to place the mark, and that he voted for contestant.

Same—Illegal Votes—Apportionment Between Contestant and Contestee—When Proper.

5. Where it was impossible for the trial court in an election contest to determine from the evidence for whom alleged illegal votes had been cast, its action in apportioning them under the rule approved in *Heyfron* v. *Mahoney*, 9 Mont. 497, was proper.

Appeal and Error—Error in Favor of Appellant.

6. From a ruling prejudicial to respondent, appellant cannot complain.

Election Contest—Burden of Proof.

7. The certificate of election in the hands of respondent was *prima facie* evidence of his right to the office in contest, and appellant had the burden of proving that respondent received a sufficient number of illegal votes charged by him to have been cast, to change the result.

Witnesses—Credibility—Question for Trial Court.

8. A court is not bound to accept a fact as proved merely because a witness has sworn to it; creditable swearing only concluding its judgment.

Costs—Memorandum—When Properly Stricken from Files.

9. Costs are recoverable only by virtue of the statute, and in order to recover them, the party making the claim must comply with its provisions; therefore, failure to file the memorandum required by section 7170, Revised Codes, operates as a waiver and justifies the court in striking the cost bill.

Election Contest—Costs—When not Recoverable.

10. Where contestee in an election contest did not file his memorandum of costs until ten days after the court's findings had been filed, it was properly stricken from the files.

ELECTION CONTEST by Emil J. Gervais against F. M. Rolfe. From judgment for contestee, and an order denying contestant a new trial, he appeals. Contestee appeals from the judgment so far as it denies his right to recover his costs. Affirmed.

Messrs. Norris & Hurd, for Appellant, submitted a brief and one in reply to that of Respondent; *Mr. Edwin L. Norris* argued the cause orally.

The court made an error in failing to find for whom the seven illegal voters other than Martin Grinolds voted and in applying the apportionment rule to Coburg precinct as to said seven votes. In this paragraph we wish to submit that the failure of the court to find for whom the illegal voters in Coburg precinct voted and in applying the apportionment rule to Coburg precinct as to such votes was such an error that entitled the appellant to a new trial and that the court erred in not granting such new trial. (29 Cyc. 816; *Brooks* v. *Prescott,* 114 Mass. 392; *Citizens' Bank* v. *Bolen,* 121 Ind. 301, 23 N. E. 146; *Labonte et al.* v. *Lacasse,* 78 N. H. 489, 102 Atl. 540; *Llewelyn* v. *Levi,* 157 Cal. 31, 106 Pac. 219; *Brown* v. *Macey,* 13 Idaho, 451, 90 Pac. 339; *Black* v. *Harrison Home Co.,* 155 Cal. 121, 99 Pac. 494.)

Where there are no statutory provisions providing for the contesting of elections, courts of equity will assume jurisdiction of such contests. This rule is stated in *Poe* v. *Sheridan County,* 52 Mont. 279, 157 Pac. 185; *Cadle* v. *Town of Baker,* 51 Mont. 176, 149 Pac. 960, and is supported by the following cases: *Gibson* v. *Trinity County,* 80 Cal. 359, 22 Pac. 225; *Calaveras County* v. *Brockway,* 30 Cal. 325; *Dickey* v. *Reed,* 78 Ill. 261; *Hamilton* v. *Carroll,* 82 Md. 326, 33 Atl. 648; *Tolbert* v. *Long,* 134 Ga. 298, 67 S. E. 828. Inasmuch as there are ample provisions of law in this state for the contesting of elections of county officers, it may not be urged that the rule last referred to may be invoked. In view of the doctrine above stated, we submit that this cause is

a special proceeding authorized by statute and that under no construction may it be considered as an action in equity.

A person who voted without being registered is an illegal voter and may be required to testify in an election contest for whom he voted. (*Black* v. *Pate*, 130 Ala. 514, 30 South. 434; *Montgomery* v. *Dormer*, 181 Mo. 5, 79 S. W. 913; *Van Winkle* v. *Crabtree*, 34 Or. 462, 55 Pac. 831, 56 Pac. 74; *Vallier* v. *Brakke*, 7 S. D. 343, 64 N. W. 180; *Welsh* v. *Shumway*, 232 Ill. 54, 83 N. E. 549; *People, etc.*, v. *Pease*, 27 N. Y. 45, 84 Am. Dec. 242; *Boyer* v. *Teague*, 106 N. C. 571, 11 S. E. 330; *Hanson* v. *Village of Adrian*, 126 Minn. 298, 148 N. W. 276, 277.)

Failure to file a memorandum of costs within the time prescribed by statute acts as a waiver of the right to costs. (15 C. J. 181; *Chapin* v. *Broder*, 16 Cal. 403, 419; *Griffith* v. *Welbanks*, 26 Cal. App. 477, 147 Pac. 986; *Steensland* v. *Hess*, 25 Idaho, 181, 136 Pac. 1124; *Linville* v. *Scheeline*, 30 Nev. 106, 93 Pac. 225; *Hayes* v. *Hutchinson*, 81 Wash. 394, 142 Pac. 865.)

Messrs. Freeman & Thelen and *Mr. D. C. Kenyon*, for Respondent, submitted a brief; *Mr. James W. Freeman* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

At the general election held in November, 1918, Emil J. Gervais and F. M. Rolfe were rival candidates for the office of county treasurer of Blaine county. The canvassing board returned that Rolfe received 662 votes and Gervais 661. A certificate of election was issued to Rolfe, and this contest was thereupon instituted. The trial resulted in a judgment in favor of Rolfe, and Gervais appealed from the judgment and from the order denying him a new trial.

The contest involves only the votes cast in two precincts. In the complaint it is alleged that in Wing precinct, where Gervais received 7 votes and Rolfe 39, 5 persons (naming them) who were not registered were permitted to vote, and in Coburg pre-

cinct, where Gervais received 19 votes and Rolfe 29, 8 persons (naming them) who were not registered were permitted to vote, and that all of these 13 votes were cast for Rolfe. In the answer it is admitted that the 13 persons named were not registered, that they voted at the election, and that each voted for a candidate for treasurer, but it is denied that they, or any of them, voted for Rolfe. The court found that of the five illegal votes cast in Wing precinct three were cast for Gervais and two for Rolfe. Appellant concedes that he received two illegal votes in Wing precinct, but complains of the action of the court in charging him with a third—the vote of one Piestraznski, who could not read or write English, and who was assisted in marking his ballot by Charles Anderson, one of the judges of election.

Upon examination of the ballots it was ascertained that the election judge had failed to make the indorsement required by [1–4] section 555, Revised Codes, and that the ballot could not be identified. Anderson testified that he did not remember for whom the voter voted, and thereupon, over the objection of contestant, Piestraznski was permitted to testify, and he testified, that Anderson read the names on the ballot to him; that, whenever the name of a candidate for whom he wished to vote was read, he placed a cross before the name; that he had known Gervais for five or six years and wanted to vote for him; that the election judge told him where to place the mark; and that he voted for Gervais. It is urged that this evidence was incompetent, for the reason that the witness, having testified that he could not read, could not know for whom he voted.

The rule is established that, whenever it appears that a voter is not a legal elector, any person having requisite knowledge may testify as to the person for whom he voted. (15 Cyc. 424.) The rule is likewise settled that, where it does not appear from direct testimony for what candidate an unqualified voter voted, the fact may be shown by circumstantial evidence (15 Cyc. 425; *Lane* v. *Bailey*, 29 Mont. 548, 75 Pac. 191; McCrary on Elections, sec. 493), and that a voter who does not remember for whom he voted may be asked for whom he intended to vote, not that his intention, as an independent fact, is material, but on the ground

that it is a circumstance tending to raise a presumption for whom he did vote. (*People* v. *Pease*, 27 N. Y. 45, 84 Am. Dec. 242.) We think the evidence was competent, and, taking all the circumstances into consideration, that the court was warranted in its finding that Piestraznski voted for Gervais.

To prove the allegation of his complaint respecting the votes [5–7] cast in Coburg precinct, contestant called 18 admittedly legal voters, each of whom testified that he voted for Gervais. Contestee then called the 8 persons who were not registered, but who had voted in that precinct, and, of these, 7 testified that they voted for Gervais, and one that he voted for Rolfe. The court was thereupon confronted with the anomalous situation that 25 persons had each testified that he voted for Gervais, whereas Gervais received only 19 votes, according to the returns and ballots. The court declared that it was impossible to determine for whom the illegal votes were cast, and thereupon applied the apportionment rule approved by this court in *Heyfron* v. *Mahoney*, 9 Mont. 497, 18 Am. St. Rep. 757, 24 Pac. 93. It is earnestly insisted that the court had no right to refuse to find for whom the illegal votes were cast merely because the evidence concerning the fact was in conflict. The rule contended for is correct as an abstract proposition, but is to be understood as subject to the qualification that there is sufficient evidence to justify a finding. The certificate of election in the hands of Rolfe was *prima facie* evidence of his right to the office (*Sommers* v. *Gould*, 53 Mont. 538, 165 Pac. 599; 9 R. C. L. 1162), and contestant assumed the burden of proving that Rolfe received a sufficient number of illegal votes to change the result (*Stephens* v. *Nacey*, 49 Mont. 230, 141 Pac. 649). It cannot be said that the court did not make any finding. The legal effect of its statement is: "The contestant has failed to prove by a preponderance of the evidence for whom the illegal votes were cast." If the court was justified in that conclusion, it then became its duty to dismiss the contest so far as it involved the votes of Coburg precinct. However, instead of doing so, the court apportioned the illegal votes, and, since this resulted to the prejudice of Rolfe only, contestant cannot complain.

But it is argued that the court could not have been in doubt that Grinolds voted for Rolfe, since his testimony to that effect [8] was not controverted. The credibility of this witness was a matter properly to be passed upon by the trial court, and a court is not bound to accept a fact as proved merely because a witness swears to it. In *Daniels* v. *Granite Bi-Metallic Consolidated Mining Co.*, 56 Mont. 284, 184 Pac. 836, we quoted with approval as follows: "It is a wild conceit that any court of justice is bound by the mere swearing. It is swearing creditably that is to conclude its judgment." But, if we assume, for the purpose of argument, that the court should have deducted this one vote from the total received by Rolfe in Coburg precinct, the result would not have been changed. Contestant was able to produce only 18 qualified electors who voted for him; so that from the evidence before the court it was manifest that he had received at least one illegal vote, and in his proposed findings (No. 12) contestant requested the court to find that J. C. Doyle (one of the voters who was not registered) had voted for him. The court might have deducted one from the total received by each candidate in this precinct, and might then have held that, as to the remaining 6 illegal votes, contestant had failed to prove by a preponderance of the evidence that any one or more of them had been cast for Rolfe. The result would have been that Gervais received 657 and Rolfe 658. Since the court reached the same result in legal effect, the method employed is not material here.

There is a cross-appeal by Rolfe from the judgment in so far [9] as it denies to him the right to recover his costs incurred in the contest proceedings. Costs *eo nomine* were not allowed at common law. They may be recovered, if at all, only by virtue of the statute, and, in order to recover them, the party making the claim must comply with the statute. (*Butte N. C. Co.* v. *Radmilovich*, 39 Mont. 157, 101 Pac. 1078; *Barrick* v. *Porter*, 56 Mont. 247, 184 Pac. 217.) It has been generally held, under a statute similar to ours, that a failure to file the memorandum

within the prescribed time operates as a waiver and justifies the court in striking out the cost bill. (15 C. J. 181.)

This appeal presents the single question: Was the memorandum filed within the time allowed by law? Section 7170, [10] Revised Codes, provides that a party who claims his costs must deliver to the clerk, and serve on the adverse party within five days after the verdict or notice of the decision of the court, a memorandum of the items of costs, *etc.* In *McDonnell* v. *Huffine,* 44 Mont. 411, 120 Pac. 792, this court determined that the decision of the court referred to in the section above is the findings of fact and conclusions of law made by the court and filed with the clerk, and that the party claiming costs must serve and file his memorandum within five days from the date upon which he has notice that the findings are filed. The record discloses that on April 2, 1919, Rolfe had notice that the findings of the court had been filed. On April 11 he served his memorandum of costs, and on April 12 filed it. Thereafter, on motion, the memorandum was stricken from the files. It is further disclosed that on April 2, 1919, Gervais filed exceptions to the findings, and these exceptions were disposed of on April 8. The contention is made that the filing of the exceptions to the findings operated to stay proceedings until such exceptions were disposed of, but this contention is without merit. There was nothing to prevent the filing of the memorandum or the entry of judgment immediately after the findings were filed. (*Gans & Klein Investment Co.* v. *Sanford,* 35 Mont. 295, 88 Pac. 955.) Since the memorandum was not served nor filed within five days from April 2, 1919, it was properly stricken from the files.

The judgment and order denying Gervais a new trial are affirmed. The judgment upon the cross-appeal of Rolfe is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY and MATTHEWS concur.

MR. JUSTICE COOPER, being absent, takes no part in the foregoing decision.

MODESITT, RESPONDENT, *v.* FLATHEAD COUNTY, APPELLANT.

(No. 4,502.)

(Submitted January 19, 1920. Decided February 9, 1920.)

[187 Pac. 911.]

County Officers—Assessors—Special Deputies—Compensation—Board of County Commissioners—Powers.

1. *Held*, that while the board of county commissioners has no power to decrease the compensation of regular deputies of county officers fixed by section 1 of Chapter 222, Laws of 1919, it has discretion, under section 2 thereof, to fix the compensation of extra deputies appointed for temporary service, at any rate it may deem expedient, provided it does not exceed the rate paid the regular deputies.

Appeal from District Court, Flathead County; T. A. Thompson, Judge.

SUBMISSION of controversy under agreed statement of facts by F. F. Modesitt against Flathead County. Judgment for plaintiff and defendant appeals. Reversed and remanded, with directions to enter judgment for defendant.

Cause submitted on briefs of counsel.

Mr. T. A. MacDonald, for Appellant.

Mr. J. E. Erickson, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This controversy was submitted to the district court for determination under the provisions of section 7254 of the Revised Codes, upon an agreed statement of facts, of which the following is a summary:

The defendant is a county of the fourth class. On January 6, 1919, the board of county commissioners of the defendant, at [1] the request of the county assessor, by an order entered in its minutes allowed five special deputies to be employed by the

assessor at a compensation for each of them of $125 per month during the time of their service. These deputies were to be "put to work when necessary and retired when not needed." The whole number so allowed was in excess of the number the assessor was authorized by law to appoint. The plaintiff, having been appointed under the order, served for a part of the month of March and for the months of April, May and June. At the end of each month he presented to the auditor, properly verified, his claim for compensation at the rate of $137.50 per month. This officer refused to allow compensation at a greater rate than that fixed by the board. The board approved his action and allowed plaintiff compensation accordingly. The difference between the gross amount thus allowed him for his services during the time he was employed and that claimed by him at the higher monthly rate was $44.75. In making the allowance as it did, the board claimed that it is vested with the power, under the provisions of section 2 of Chapter 222 of the Laws of the Sixteenth Session of the Legislature, to fix the compensation at any rate, provided the rate does not exceed $137.50 per month. The position assumed by plaintiff was that the board has no discretion whatever, and that he was therefore entitled to receive compensation at the rate claimed. The district court sustained plaintiff's contention and entered judgment in his favor. The defendant has appealed.

The general purpose of the Act referred to is to fix the annual compensation of the regular deputies of county officers, the rate being determined by the class within which each county falls, and to vest in the board of commissioners of each of the several counties the power to fix the compensation of all other deputies or assistants. So far as applicable here, it provides:

Section 1: "The annual compensation allowed to any deputy or assistant is as follows: * * * Counties of the fourth and fifth class. * * * Deputy treasurer and deputy assessor allowed by law at a rate of not less than one thousand, six hundred and fifty dollars. * * * "

Section 2: "The boards of county commissioners in the several counties of the state shall have the power to fix the compensation allowed any deputy or assistant under this Act, where any deputy or assistant is employed for a period of less than one year. The compensation of such deputy or assistant shall be for the time so employed provided the rate of such compensation shall not in any event be to exceed the rates fixed by this Act for similar deputies or assistants."

Section 1 has reference to compensation of deputies who are appointed by the several assessors in the counties of the fourth and fifth classes for services during the term. It fixes this at the annual minimum rate of $1,650, which is equivalent to the monthly minimum rate of $137.50. Section 2 has reference only to deputies who may be appointed for temporary service during the busy months of the year when the assessors are engaged in obtaining schedules of the property of taxpayers from which to make up their assessment-rolls. As to the former, the board cannot decrease the compensation fixed by section 1. As to the latter, it is vested with discretionary power to fix the compensation at any rate it may deem expedient for the time during which the deputy serves, provided it does not exceed the rate fixed for regular deputies. The first sentence expressly confers the power to fix the compensation of those appointed for temporary service. The proviso then declares that "the rate of such compensation shall not in any event exceed the rate fixed by this Act for similar deputies or assistants"; that is, for deputies or assistants whose compensation is fixed by section 1. The plaintiff, having accepted service under the order of the board, was entitled to receive the monthly compensation fixed by it and no more.

The judgment is therefore reversed, and the cause is remanded to the district court, with direction to render judgment in favor of the defendant.

Reversed and remanded.

ASSOCIATE JUSTICES HOLLOWAY, HURLY, MATTHEWS and COOPER concur.

SPRINKLE, APPELLANT, v. ANDERSON, RESPONDENT.

(No. 4,095.)

(Submitted January 14, 1920. Decided February 9, 1920.)

[187 Pac. 909.]

Appeal and Error—Evidence not Part of Bill of Exceptions—How Made Part of Record on Appeal.

1. Where a transcript of the stenographer's notes of the evidence, not made a part of a bill of exceptions, is sought to be made available on appeal under the provisions of Chapter 149, Laws of 1915, it must be certified as correct by the trial court or agreed by counsel to be so; otherwise it cannot be considered by the supreme court for any purpose.

Appeal from District Court, Blaine County; W. B. Rhoades, Judge.

ACTION in claim and delivery by James L. Sprinkle against Moses Anderson and Susan Anderson. From judgment for defendants, plaintiff appeals. Affirmed.

Mr. Frank N. Utter, for Appellant, submitted a brief.

Messrs. Norris & Hurd and *Mr. John C. Duff,* for Respondents, submitted a brief; *Mr. Edwin L. Norris* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action in claim and delivery. At the close of the evidence on the trial in the district court, on motion of defendants, the court directed a verdict in their favor. From the judgment entered thereon, the plaintiff has appealed. The only question submitted by counsel is whether the evidence was sufficient to make a case calling for the judgment of the jury.

In preparing their transcript on appeal, counsel attempted to proceed under the provisions of Chapter 149, Session Laws of 1915, but failed entirely to meet their requirements. The statute was considered at length by this court in the case of *Roberts*

v. *Sinnott*, 54 Mont. 114, 169 Pac. 49. It was therein pointed out how the transcript on appeal must be prepared in order to incorporate in it any matter which is deemed material on the appeal, but which does not appear in the judgment-roll. It was also pointed out how the stenographer's notes of the evidence, though not incorporated in the transcript as first prepared, may nevertheless be made available in this court in aid of the appeal. In order to make them available, they must either be "certified by the court or judge as correct after notice * * * or agreed to by written stipulation of the attorneys." The transcribed copy may then be forwarded to the clerk of this court, and may be referred to by the court for the decision of any matter before the court, as fully as if it had been made a part of a bill of exceptions, provided it has been thereafter incorporated in the transcript.

Though what purports to be a copy of the notes of the testimony is incorporated in the transcript, it is not certified by the court or judge as correct. Neither is there attached to it a stipulation of counsel. The evidence is, therefore, not before us for any legitimate purpose. The decision in *Roberts* v. *Sinnott* was rendered on December 11, 1917. Although the attention of counsel was thus called to the requirements of the statute, and they have had ample opportunity to present the evidence properly authenticated and have it incorporated in the transcript by way of amendment to it, they have not seen fit to do so. This condition of the transcript precludes us from considering the question submitted on its merits. No error is apparent upon the judgment-roll.

The judgment is therefore affirmed.

Affirmed.

ASSOCIATE JUSTICES HOLLOWAY, HURLY and MATTHEWS concur.

MR. JUSTICE COOPER, being absent, takes no part in the foregoing decision.

LEHFELDT CO., APPELLANT, *v.* JUSTICE, RESPONDENT.

(No. 4,096.)

(Submitted January 14, 1920. Decided February 9, 1920.)

[187 Pac. 912.]

Pleading and Practice — Complaint — Commingling Causes of Action—Order to Separately State and Number—Failure to Comply—Dismissal Proper.

1. Where plaintiff, who had been ordered to separately state and number his causes of action alleged by defendant to have been commingled in the complaint, availed himself of the time granted for that purpose and secured additional time to file, and did file, an amended complaint, which, however, did not comply with the order, the latter pleading was properly stricken from the files.

Appeal from District Court, Phillips County; John Hurly, Judge.

ACTION by the Lehfeldt Company against J. R. Justice. Judgment for defendant and plaintiff appeals. Affirmed.

Mr. R. E. O'Keefe submitted a brief in behalf of Appellant.

Mr. D. J. Sias, Jr., and *Messrs. Norris & Hurd*, for Respondent, submitted a brief; *Mr. Edwin L. Norris* argued the cause orally.

When the court makes an order requiring a pleading of a specified character to be filed, and a pleading is filed which does not conform to the order, such pleading may be stricken from the files. (*O'Conner* v. *Chicago etc. Ry. Co.*, 75 Iowa, 617, 34 N. W. 795; *Craig* v. *James*, 80 App. Div. 16, 80 N. Y. Supp. 235; *Long* v. *Hunter*, 48 S. C. 179, 26 S. E. 228; *Fuller* v. *Claflin*, 93 U. S. 14, 23 L. Ed. 785 [see, also, Rose's U. S. Notes].)

It is also a theory of law that when an amended pleading is substantially a repetition of a former pleading, it may be stricken from the files. (*Robinson* v. *Erickson*, 25 Iowa, 85; *Independent Order of Odd Fellows* v. *Troutman*, 73 Kan. 35, 84 Pac. 567;

Loghry v. *Fillmore County,* 75 Neb. 158, 106 N. W. 170; *Bush* v. *McMann,* 12 Colo. App. 504, 55 Pac. 956; *Emigrant etc. Bank* v. *Goldman,* 75 N. Y. 127, 128; *Sun Printing etc. Assn.* v. *Abbey etc. Co.,* 62 App. Div. 54, 70 N. Y. Supp. 871; *Austin* v. *Wauful,* 59 Hun, 620, 13 N. Y. Supp. 184.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to recover upon an assigned claim for work and labor performed, materials furnished and money advanced by Henry Robinson at the special instance and request of defendant and for his use and benefit. Defendant moved the court to require plaintiff to separately state and number the three causes of action alleged to be commingled in the complaint. The motion was sustained and plaintiff granted twenty days within which to comply with the order. Thereafter additional time was secured, and on July 3 a second complaint was filed, which, however, did not differ in any material respects from the first, and did not comply with the order. On motion of defendant, this second complaint was stricken from the files and the action dismissed. From the judgment of dismissal, plaintiff appealed.

When the order to separate was made, plaintiff had the choice [1] of standing on his original complaint and testing the validity of the order, or complying with the order. Apparently, the latter alternative was chosen, for plaintiff not only availed himself of the time granted for compliance, but secured additional time "to file an amended complaint." Having thus made its election, the duty to comply with the order was imposed upon plaintiff, and, to an equal extent, the duty was imposed upon the court to enforce compliance or violate its own order. The court refused to stultify itself and dismissed the action, and in doing so was clearly correct. (*O'Conner* v. *Chicago, R. I. & P. Ry. Co.,* 75 Iowa, 617, 34 N. W. 795; *Eisenhouer* v. *Stein,* 37 Kan. 281, 15 Pac. 167; *Miskimmons* v. *Moore,* 10 Wyo. 41, 65 Pac.

1000; *Loghry* v. *Fillmore County*, 75 Neb. 158, 106 N. W. 170; 31 Cyc. 649.)

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE MATTHEWS concur.

MR. JUSTICE HURLY, being disqualified, and MR. JUSTICE COOPER, being absent, take no part in the foregoing decision.

SPRINKLE, APPELLANT, *v.* ANDERSON, RESPONDENT.

(No. 4,080.)

(Submitted January 13, 1920. Decided February 9, 1920.)

[187 Pac. 908.]

Forcible Entry—"Breaking" Open—Sufficiency of Complaint—Nonsuit—Presumptions.

Nonsuit—Presumptions.

1. On motion for nonsuit, every fact is deemed to be proved which the evidence tends to establish, and if, viewed in the light most favorable to plaintiff, it makes out a *prima facie* case, it is error to grant the motion.

Same—When Proper.

2. A case should not be withdrawn from the jury unless as a matter of law recovery cannot be had in any view of the evidence, including legitimate inferences to be drawn from it.

Forcible Entry—"Breaking" Open—Sufficiency of Complaint.

3. *Held*, in an action in forcible entry, that an allegation of the complaint that though the doors and windows of the dwelling in question had been securely fastened, defendant forced open the doors and windows and entered the dwelling, *etc.*, was sufficient to constitute a "breaking" open of the doors and windows, under section 7269, subdivision 1, Revised Codes.

Same—*Prima Facie* Case—Sufficiency.

4. Where one in possession of a dwelling-house, while temporarily absent, leaves the doors and windows securely locked, and upon his return finds an intruder therein, without his consent, the circumstances indicating an entry by forcing or breaking open the widows or doors,

a showing of other force or violence is not necessary to warrant a submission of a cause of action in forcible entry to the jury.

[On right of one who was in peaceable possession to maintain forcible entry and detainer against another entitled to possession, who forcibly dispossessed him, see notes in 8 L. R. A. (n. s.) 426; 32 L. R. A. (n. s.) 51; L. R. A. 1918B, 670.]

Appeal from District Court, Blaine County; W. B. Rhoades, Judge.

ACTION by James L. Sprinkle against Moses Anderson. From judgment of nonsuit, plaintiff appeals. Reversed and remanded.

Mr. Frank N. Utter, for Appellant, submitted a brief.

Messrs. Norris & Hurd, for Respondent, submitted a brief; *Mr. Edwin L. Norris* argued the cause orally.

This court has in a number of instances construed the provisions of section 7269, Revised Codes, but the case of *Spellman* v. *Rhode*, 33 Mont. 21, 81 Pac. 395, is the only case wherein a question was discussed applicable to the matters under consideration in the case at bar. In this case the court considered a complaint containing the allegation that "the defendant forcibly and without right entered thereon and by force and arms ejected plaintiff therefrom." It was held that this complaint stated a cause of action in forcible entry, and in discussing the proposition of the forcible entry and detainer statute said that it is designed "to furnish a summary remedy to obtain possession of real property and to prevent even rightful owners from taking the law into their own hands and proceeding to recover possession by violence." We construe this decision as holding that force is an element in forcible entry, and as supporting our contention in the lower court that the appellant failed to show that respondent exercised any force or violence or broke any doors, *etc.*, as required by the statute to constitute forcible entry.

In *Amos* v. *Cohn*, 7 Cal. App. 432, 94 Pac. 590, the court defines the term "force" as used in subdivision 1, section 1160, of the California Code of Civil Procedure, and holds that it "contemplates actual force or such conduct on the part of de-

fendant as tends to inspire a just apprehension of violence." In the case of *San Francisco & Sub. Home Bldg. Society* v. *Leonard*, 17 Cal. App. 254, 119 Pac. 405, in discussing forcible entry and unlawful detainer, the court holds that the purpose of the statute is to prevent a person from redressing or attempting to redress his wrongs in a way that would be likely to lead to serious wrongs against the public or society. (See, also, *Polack* v. *McGrath et al.*, 25 Cal. 54; *Taylor* v. *Scott*, 10 Or. 483; *Wolfer* v. *Hurst*, 47 Or. 156, 8 Ann. Cas. 725, 80 Pac. 419, 82 Pac. 20; *Romero* v. *Gozales*, 3 N. M. 35, 1 Pac. 171; *Fowler* v. *Pritchard*, 148 Ala. 261, 41 South. 667; *Smith* v. *Reader*, 21 Or. 541, 15 L. R. A. 172, 28 Pac. 890.)

MR. JUSTICE HURLY delivered the opinion of the court.

Action in forcible entry. Plaintiff's testimony was to the effect that he was in possession of certain premises, using the land for farming purposes, certain of his employees occupying the dwelling-house thereon up to about the 6th or 7th of June, 1916, when they left the premises to work elsewhere for plaintiff, leaving the house securely locked, nailing shut the windows, locking and nailing shut the front door, and fastening the kitchen door with a padlock, the keys remaining with plaintiff's employees. The defendant, sworn in behalf of plaintiff, testified that he went upon the premises June 25, 1916, entered the dwelling-house, and continued to reside therein, without having obtained permission from plaintiff so to do.

At the close of plaintiff's case a nonsuit was granted on motion of the defendant. From judgment based upon the order granting the nonsuit, plaintiff has appealed.

It is conceded that plaintiff bases his right to recover upon the provision of section 7269, Revised Codes of 1907, section 1, as follows: "Every person is guilty of a forcible entry who either: 1. By breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror enters upon or into any real property or mining claim."

Defendant asserts that, no showing of force, violence or circumstances of terror having been made, the nonsuit was properly granted.

On motion for nonsuit every fact is deemed to be proved [1] which the evidence tends to establish, and if, viewed in the light most favorable to plaintiff, the evidence makes out a *prima facie* case, it follows that the trial court erred in granting the nonsuit. A case should never be withdrawn from the jury [2] unless it follows as a matter of law that recovery cannot he had upon any view of the evidence, including the legitimate inferences to be drawn from it. (*Morelli* v. *Twohy Bros. Co.*, 54 Mont. 366, 170 Pac. 757, and cases cited.)

Contention is made that the allegation of the complaint that, [3] "the doors and windows of said dwelling being then and theretofore securely fastened, the said defendant did then and there force open the said doors and windows, and entered into said dwelling-house and premises," *etc.*, does not constitute a charge of "breaking" as used in the statute. However, see *Winchester* v. *Becker*, 4 Cal. App. 382, 88 Pac. 296.

While the exact manner of defendant's entry of the dwelling-house is shown only circumstantially, it is a legitimate inference from the evidence that plaintiff entered as alleged in the complaint. (*Davidson* v. *Phillips*, 9 Yerg. (Tenn.) 93, 30 Am. Dec. 393.)

Where one in possession of a dwelling-house, while temporarily absent, leaves the doors and windows securely locked, and upon his return finds an intruder therein, without his consent, the circumstances indicating an entry by forcing or breaking open the windows or doors, a showing of such facts will ordinarily justify submission of a cause of action in forcible entry to the jury, without a showing of other force or violence, under our statute, *supra*. In this connection see *Davidson* v. *Phillips*, *supra*; *Winchester* v. *Becker*, *supra*; *Mason* v. *Powell*, 38 N. J. L. 576; *Wilson* v. *Campbell*, 75 Kan. 159, 121 Am. St. Rep. 366, 12 Ann. Cas. 766, 8 L. R. A. (n. s.) 426, 88 Pac. 548; *Brawley* v. *Risdon*, 38 Cal. 676.

We have examined the cases cited by respondent, but they are based upon facts different from those disclosed here, or upon rules of law differing from our statute, which was evidently drawn with a design to avoid nice distinctions as to the amount of force necessary to constitute the entry a forcible one within its intent. (*Gray* v. *Collins*, 42 Cal. 152.)

By this ruling we do not pass upon the question as to whether the plaintiff had established his claim as alleged in the complaint in its entirety, that is, whether he had proven any damages, or whether his entry into the dwelling constituted a forcible entry upon the remainder of the tract of land sufficient to justify the submission of the case to the jury as to these features.

The motion for a nonsuit was improperly granted.

The judgment is reversed, and the cause remanded to the district court.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, MATTHEWS and COOPER concur.

MOORE BROS. SHEEP CO., RESPONDENT, v. LEHFELDT, APPELLANT.

(No. 4,093.)

(Submitted January 14, 1920. Decided February 9, 1920.)

[187 Pac. 910.]

Pleading—Conclusions—Insufficiency.

1. An allegation in an action to recover the consideration paid for a written lease of real property that the lease was void was one of a legal conclusion and insufficient to support a judgment.

Appeal from District Court, Blaine County; W. B. Rhoades, Judge.

ACTION by the Moore Bros. Sheep Company against Julius Lehfeldt. Judgment for plaintiff and defendant appeals. Reversed and remanded.

Cause submitted on briefs of Counsel.

Mr. Frank N. Utter, for Appellant.

Messrs. Stranahan & Stranahan and *Mr. L. V. Beaulieu,* for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This appeal, by the defendant, from a judgment in favor of plaintiff, presents but one question: Does the complaint state facts sufficient to constitute a cause of action?

Stripped of formal parts, the complaint alleges that on April [1] 25, 1915, plaintiff and defendant entered into an agreement in writing by the terms of which defendant leased to plaintiff for one year certain real estate, describing it, for the sum of $75; that, believing the lease to be valid, plaintiff paid to defendant the sum of $75; that the lease was null and void; that plaintiff received no consideration for the money; and that, though demand has been made, defendant refuses to return it.

The sufficiency of the complaint was tested by general demurrer and by objection to the introduction of evidence.

It is apparent from the complaint that whether plaintiff received any consideration for the money paid is made to depend upon the validity or invalidity of the lease. The allegation that the lease was and is null and void is but the statement of a bare, legal conclusion. There is not a fact disclosed from which the invalidity can be determined.

Section 6532, Revised Codes, provides that the complaint must contain a statement of the facts constituting the cause of action; and, because the complaint in this instance fails to do so, it will

not support a judgment. (*Truro* v. *Passmore*, 38 Mont. 544, 100 Pac. 966.)

The judgment is reversed and the cause is remanded for further proceedings.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

STATE, RESPONDENT, *v.* DUMPHY ET AL., APPELLANTS.

(No. 4,063.)

Submitted January 16, 1920. Decided February 9, 1920.

[187 Pac. 897.]

Criminal Law—Gaming—Evidence—Conflict—Sufficiency.

Gaming—Conflicting Evidence—Verdict Conclusive.

1. In a prosecution for permitting a gambling game to be played in defendants' cigar-store, a verdict of guilty, based upon conflicting evidence sufficient to go to the jury, will not be disturbed on appeal.

Same—Size of Stakes Immaterial.

2. Section 8416, Revised Codes, prohibiting gambling, makes no distinction as to the amount of the stakes involved; hence it is immaterial that the stakes were merely treats or cigars.

Appeal from District Court, Missoula County; Asa L. Duncan, Judge.

PETE DUMPHY and Pete Anderson were convicted of permitting a gambling game, and from the judgment of conviction and from an order denying them new trial, they appeal. Affirmed.

Cause submitted on briefs of Counsel.

Thomas A. Marlowe, for Appellants.

Mr. S. C. Ford, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for Respondent.

Playing for drinks or cigars, etc., is gambling. (20 Cyc. 889; 12 R. C. L. 715.) Playing at cards with an agreement

that the losing party shall pay for the drinks, constitutes gambling. (*State* v. *Leicht,* 17 Iowa, 28; *McDaniel* v. *Commonwealth,* 69 Ky. (6 Bush) 326; *State* v. *Wade,* 43 Ark. 77, 51 Am. Rep. 560; *Brown* v. *State,* 49 N. J. L. 61, 7 Atl. 340; *Hitchins* v. *People,* 39 N. Y. 454; *Vanwey* v. *State,* 41 Tex. 639; *Hamilton* v. *State,* 75 Ind. 586; *State* v. *Book,* 41 Iowa, 550, 20 Am. Rep. 609; *State* v. *Bishel,* 39 Iowa, 42; *Stahel* v. *Commonwealth,* 70 Ky. (7 Bush) 387; *Commonwealth* v. *Taylor,* 80 Mass. (14 Gray) 26; *State* v. *Leighton,* 23 N. H. 167; *State* v. *Mathis,* 206 Mo. 604, 121 Am. St. Rep. 687, and notes, 105 S. W. 604; *Hopkins* v. *State,* 122 Ga. 583, 2 Ann. Cas. 617, and notes, 69 L. R. A. 117, 50 S. E. 351.)

MR. JUSTICE HURLY delivered the opinion of the court.

Defendants appeal from a judgment of conviction, after a trial upon a charge of permitting a gambling game to be played in their cigar-store in Missoula, and from an order denying a motion for a new trial.

Error is assigned concerning the reception of certain testimony offered by the state, but we find no prejudice to the rights of the defendants in the rulings thereon, and this particularly in view of the testimony offered in behalf of defendants, practically to the same effect as that offered by the state.

The testimony of the state shows the operation of the cigar-store by the defendants, and the playing of the game of cards for stakes. A witness for the state testified to the presence of the defendants during the progress of the game, and the selling by defendant Anderson of chips or checks for use by the players.

The defendants produced testimony that defendant Anderson was not present in the cigar-store during the progress of the game, and that he sold no chips or checks. One witness for the defense testified that he was a player in the game, and that when one lost he paid for the treats or cigars for the other players. Defendant Dumphy testified that he was attending to all games going on in the store, that he knew of the playing, and that the

participants played for the treats or cigars. Defendant Anderson did not testify.

The testimony concerning Anderson's presence and other [1] important evidence given for the state was contradicted by the defense, but it was for the jury to decide the conflict. This they did, by finding the defendants guilty. There being evidence sufficient to go to the jury, we will not disturb its finding.

It is true that the stakes played for were small, but the statute [2] (sec. 8416, Rev. Codes) under which the action was prosecuted makes no distinction as to the amount involved.

The specifications of error regarding the reception of evidence do not comply with the rules of the court—Rule X, 3b (53 Mont. xxxv, 167 Pac. x)—though we have examined the rulings complained of in this instance.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, MATTHEWS and COOPER concur.

HENSEN, RESPONDENT, *v.* MERTON, APPELLANT.

(No. 4,091.)

(Submitted January 13, 1920. Decided February 9, 1920.)

[187 Pac. 1017.]

Trusts — Public Lands — "Soldiers' Scrip" — Pleading — Complaint — Verification.

Pleading—Complaint—Facts, not Conclusions, to be Stated.

1. Under section 6532, Revised Codes, facts must be pleaded in the complaint, not conclusions, nor evidence from which facts might be inferred.

Same—Verification—Insufficiency.

2. The requirement that the complaint must be verified by affidavit of plaintiff that the pleading is true of his own knowledge, *etc.*, *held* not to have been met by a statement as to matters vital to his case that certain public records show certain facts of which he asserts neither knowledge nor belief.

Trusts—Public Lands—Burden of Proof.

3. In an action to have the patentee of public lands declared trustee for plaintiff, and to require the execution and delivery of a deed to the property to him, he had the burden of showing such equities in himself as would control the legal title in the hands of defendant.

Same—"Soldiers' Scrip"—Public Lands—Equitable Title—Complaint.

4. One who seeks to oust a patentee of public lands under soldiers' scrip secured from alleged heirs at law of a deceased Civil War soldier, must allege in his complaint such facts as will connect him with the original title from the government, and such as will bring the deceased soldier and those holding under him within the provisions of sections 2304–2307 of the Revised Statutes of the United States; otherwise it will not state a cause of action.

Same—"Soldiers' Scrip"—Right of Soldier Extended to Minor, not Adult, Children—Statutes.

5. Only minor children of a Civil War soldier, acting by a duly appointed and accredited guardian, were, in case of death of the father, entitled to enter public land under sections 2304–2307 of the Revised Statutes of the United States, the right being extended by section 2307 to them only, not to adults.

Appeal from District Court, Blaine County; John W. Tattan, Judge.

ACTION by William R. Hensen against Lawrence Merton. Judgment for plaintiff and defendant appeals. Reversed.

Mr. John W. Stanton, for Appellant, submitted a brief and argued the cause orally.

On the entire record this case should be reversed and judgment given in favor of defendant, for the reason that the evidence does not show that plaintiff is entitled to any relief. Plaintiff does not show that Merton perpetrated any fraud or wrong upon him or that the land department perpetrated any fraud or wrong upon him or that in its decision rejecting his fraudulent scrip the officers of the land department were deceived or that they misconstrued or misapplied the law or made any mistake in findings of fact. Merton holds the legal title to this land under patent issued to him by the United States under the homestead laws. A patent is an official declaration of the government that the law has been complied with, and raises the presumption that the officials of the land department had before them sufficient proof to justify the issuing of the patent to the patentee. (*Gebo v. Clarke Fork Coal Min. Co.,* 30 Mont. 87, 75 Pac. 859.) That

the holder of the legal title under a patent may be adjudged to hold it as trustee for plaintiff, because of an erroneous ruling of the land department, it is necessary to show not only that defendant was not entitled to the patent, but that plaintiff was so entitled. (*Small* v. *Rakestraw*, 28 Mont. 413, 104 Am. St. Rep. 691, 72 Pac. 746; s. c., 196 U. S. 403, 49 L. Ed. 527, 25 Sup. Ct. Rep. 285 [see, also, Rose's U. S. Notes].)

In a proceeding to review a decision of the secretary of the interior on a question of title to land, it will be presumed that the secretary found as proved sufficient facts to support his judgment, where his findings of fact are not set out, but evidence on which the judgment is based is outlined. (*Wiseman* v. *Eastman*, 21 Wash. 163, 172, 57 Pac. 398.)

And inasmuch as the findings of the land department on questions of fact are conclusive when the charge is that the land department has erred in the decision of a mixed question of law and fact, what the facts were as laid before and found by the department must be shown so as to enable the court to see clearly that the law was misconstrued. (*Lee* v. *Johnson*, 116 U. S. 48, 29 L. Ed. 570, 6 Sup. Ct. Rep. 249 [see, also, Rose's U. S. Notes].)

Messrs. Norris & Hurd, for Respondent, submitted a brief; *Mr. Edwin L. Norris* argued the cause orally.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

The complaint herein is entitled "Bill in Equity," from which it appears that respondent made application, at the United States land office at Havre, Montana, for 120 acres of land, on what is familiarly known as "soldiers' scrip," which he secured by mesne conveyance from Darius Walton, Jr., and John Walton, the sole heirs at law of one Darius A. Walton. The complaint alleges:

"III. That the records of the General Land Office show that Darius A. Walton made original homestead entry at the United

States land office at Ionia, in the state of Washington, on the 27th day of September, 1873, section 35, township 15, range 15 west.

"IV. That the records of the department further show that the said Darius A. Walton served as a Michigan soldier during the Civil War in Company H, 28th Regiment, Michigan Infantry."

That by virtue of section 2306 of the Revised Statutes of the United States (U. S. Comp. Stats., sec. 4594) the said Darius A. Walton became entitled to a soldiers' additional bounty land right, which was assignable; that Walton had not been heard of for more than seven years, and is believed to have died about 1890, and left surviving him "no widow, and the aforesaid John and Darius A. Walton, Jr., as his sole and only heirs at law"; that the Department of the Interior refused to give force and effect to the assignments, which action of the department was illegal; and that appellant knew of the rights of the respondent, but was permitted to enter the land, and finally to receive a patent therefor. The complaint further alleges that respondent is the equitable owner of the land by reason of his filing, and that appellant holds the naked legal title as trustee for respondent. This appeal is from a judgment in favor of respondent.

Appellant urges that the complaint does not state facts sufficient to constitute a cause of action, for two reasons:

Section 6532 of the Revised Codes provides that the complaint [1] must contain: "A statement of the facts constituting the cause of action, in ordinary and concise language."

That facts are to be pleaded, and not conclusions, nor evidence from which facts might be inferred, is an elemental rule of pleading. The allegations of paragraphs III and IV, quoted, are not statements of fact at all, but merely a recitation of what the pleader says is disclosed in the records of the General Land Office.

The complaint must be verified by the affidavit of the party to [2] the effect that the pleading is true of his own knowledge, except as to matters alleged on information and belief. In this

instance the affidavit of respondent, as to matters vital to his case, is merely that "the records of the General Land Office show" certain things, of the truth or falsity of which, as a matter of fact, he asserts neither knowledge nor belief.

Respondent was seeking to establish equitable title in himself [3] and to require the execution and delivery to him of a deed for the property. In order to prevail it was incumbent upon him to show such equities in himself as would control the legal title in the hands of appellant. (*Gebo* v. *Clarke Fork Min. Co.*, 30 Mont. 87, 75 Pac. 859.) The complaint, then, must allege [4] such facts as will connect respondent with the original title from the government. In order to do so, he must therein state such facts as will bring Darius A. Walton, and those holding under him, within the provisions of sections 2304 to 2307 of the Revised Statutes of the United States (U. S. Comp. Stats., secs. 4592–4594, 4602).

Section 2304 [sec. 4592] provides: "That every private soldier and officer who has served in the army in the United States during the recent Rebellion for ninety days and who was honorably discharged and has remained loyal to the government" is entitled to enter homestead land not exceeding 160 acres.

Section 2306 [sec. 4594] provides that, where such a soldier has entered less than 160 acres, he shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed 160 acres; while section 2307 [sec. 4602], in the case of the death of the soldier, extends the right to his widow, if unmarried, or, if she be dead or married, to his "minor orphan children, by a guardian duly appointed and officially accredited at the Department of the Interior."

The complaint in this action is silent, in addition to its failure to allege as facts that Darius A. Walton was a soldier in the Civil War, and that he had, prior to the assignment of the right by his heirs, entered less than 160 acres, as to whether he served ninety days in the army, and as to whether he was honorably discharged therefrom. Indeed, as to the quantity of land entered, it would appear from the complaint, if it alleges anything in this connec-

tion, that he entered an entire section of land. This, of course, would have been impossible under the law; but what portion of the section described are we to assume he did enter?

While the complaint alleges that the widow of Walton is dead, and that the assignors named were the sole heirs at law of the soldier, it is silent as to whether or not they were minors, and rather negatives the possibility by showing that they made the assignment in their own right, and not by guardian, as required by the law under which they assumed to act.

In view of the defects pointed out, clearly the complaint does not state facts sufficient to constitute a cause of action, and the judgment of the district court must be reversed. However, as, under this disposition of the case, the matter may come up again, we are constrained to note here that, from the documentary evidence adduced at the trial, the facts in this case are such that the complaint cannot be amended to state a cause of action. The evidence referred to is this: Darius A. Walton, the soldier, married Anna Forbear March 13, 1876; two children born, to-wit, John and Darius Walton. Walton deserted his wife some five or six years later, and never returned, but was reported to have been drowned in the spring of 1890. The assignments by the Walton brothers were made in June, 1906, at which time they made affidavit to the fact that they were then both over the age of twenty-one years, and at which time the youngest must have been at least twenty-four years of age.

Under section 2307, Revised Statutes of the United States, [5] only the "minor orphan children" of the soldier, acting "by a guardian duly appointed and officially accredited at the Department of the Interior," were entitled to the benefit of the Chapter. As was well said by Hon. Clay Tillman, in Circular No. 528 from the Department of the Interior, of date February 15, 1917: "It was never in the mind of Congress that these rights should pass beyond the limits indicated in the sections. Out of gratitude to the soldier, Congress desired to confer upon him personally a material benefit; if he died before gaining that benefit, upon those dependent upon him—his widow or his minor chil-

dren; not upon adult children, not upon collateral heirs, and certainly not, in the absence of any heir, upon some state or foreign government."

Other questions are raised by counsel, but do not require consideration under this disposition of the case.

The judgment of the district court is reversed.

Reversed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

SMITH, RESPONDENT, v. KLEINSCHMIDT, APPELLANT.

(No. 4,092.)

(Submitted January 14, 1920. Decided February 9, 1920.)

[187 Pac. 894.]

Slander—Defenses—Truth of Statement — Insurance—"Rebating"—Misdemeanor.

Insurance—"Rebating" a Misdemeanor.

1. A fire insurance solicitor who, pursuant to an agreement with an agent of the owner of a business block, paid over to the agent two-thirds of the commission earned by him in writing the insurance upon such block, was guilty of "rebating," an act made a misdemeanor by section 4028, Revised Codes.

Slander—Truth of Statement a Defense.

2. The truth of the statement by defendant that plaintiff, while acting as a fire insurance agent, was guilty of rebating, having been established, it constituted a defense to an action for slander, and the court erred in refusing to direct a verdict in favor of defendant.

[On the question of applicability of statute against rebates and discrimination to allowance by agent to insured of part of former's commissions, see note in 23 L. R. A. (n. s.) 722.]

[On truth as a defense to action for libel or slander, see notes in 21 L. R. A. 502; 31 L. R. A. (n. s.) 132; 50 L. R. A. (n. s.) 1040.]

Appeal from District Court, Lewis & Clark County; R. Lee Word, Judge.

ACTION by A. G. Smith against Reinhold H. Kleinschmidt. Judgment for plaintiff and defendant appeals. Reversed and remanded.

Mr. Edward Horsky, for Appellant, submitted a brief; *Mr. Geo. F. Shelton,* of Counsel, argued the cause orally.

On the proposition that the transaction narrated by the plaintiff, both in his testimony in this case and in his original complaint, constitutes rebating, the following cases are cited: *Equitable Life Assur. Soc.* v. *Commonwealth,* 121 Ky. 543, 89 S. W. 537; *Citizens' Life Ins. Co.* v. *Commissioner of Insurance,* 128 Mich. 85, 87 N. W. 126; *Metropolitan Life Ins. Co.* v. *People,* 209 Ill. 42, 70 N. E. 643; *McNaughton* v. *Des Moines Life Ins. Co.,* 140 Wis. 214, 122 N. W. 764; *State* v. *Hibernia Ins. Co.,* 38 La. Ann. 465, 467; *Interstate Life Assur. Co.* v. *Dalton,* 165 Fed. 176, 178, 23 L. R. A. (n. s.) 722, 91 C. C. A. 210; *People* v. *American Life Ins. Co.,* 267 Ill. 504, 108 N. E. 679.

There is no such crime as "rebating" *eo nomine,* either at common law or under the Montana statutes. Where there is no crime *eo nomine,* necessarily no slander *per se* can be charged in an attempt to characterize that as crime, which is not *eo nomine* a crime. Plaintiff failed to allege that the hearer understood the "illegal" act of "rebating" to refer to any criminal offense. An act may be illegal and yet not criminal. Where the words declared are capable of conveying the defamatory meaning claimed for them, and also equally capable of conveying some other and innocent meaning, there must be an averment and innuendo showing not only that the words were intended by defendant in a defamatory sense, but that the hearers understood the language as conveying the alleged defamatory meaning. (*Smith* v. *Gaffard,* 33 Ala. 168; *Maynard* v. *Firemen's Fund Ins. Co.,* 34 Cal. 48, 91 Am. Dec. 672; *Hamilton* v. *Lowery,* 33 Ind. App. 184, 71 N. E. 54; *Cosand* v. *Lee,* 11 Ind. App. 511, 38 N. E. 1099; *Wilson* v. *Beighler,* 4 Iowa, 427; *Woolnoth* v. *Meadows,* 5 East, 463, 102 Eng. Reprint, 1148, 2 Smith K. B. 28, 7 Rev. Rep. 742; 25 Cyc. 452.)

In slander actions, the substance of the precise words alleged or so many of the words as charge the particular act alleged must be proved, and it is not enough to prove other words which would give an impression similar to that of the words alleged, or justify an inference of a charge of the particular act or offense. (*Fleet* v. *Tichenor*, 156 Cal. 343, 34 L. R. A. (n. s.) 323, 104 Pac. 458; *Boyce* v. *Wheeler*, 161 Mo. App. 504, 144 S. W. 119; *Bleitz* v. *Carton*, 49 Wash. 545, 95 Pac. 1099; *Eisfelder* v. *Klein*, 5 Ky. Law Rep. 138; *Wooten* v. *Martin*, 140 Ky. 781, Ann. Cas. 1912B, 407, 131 S. W. 783.)

The truth is a complete defense. Section 10, Article III, of the state Constitution, in speaking of the freedom of speech, contains this language: "That in all suits and prosecutions for libel, the truth thereof may be given in evidence." The Constitution does not go further, or make any other reference to the effect of the truth, except to say that it may be given in evidence. What is necessary to constitute slander is left wholly to the legislature, which in the provisions of section 3602 has given the definition, and by that definition we are bound. The legislature has gone further, and in the provisions found in section 6578, has stated that the truth may not only be in evidence, but that it is a justification. In this particular case, the facts seem to resolve themselves into this statement: The defendant alleged that plaintiff had been guilty of rebating, and the plaintiff admits that he did the rebating. Hence, the defendant is accused of having told the truth respecting the plaintiff. (*Castle* v. *Houston*, 19 Kan. 417, 27 Am. Rep. 127; *Ellis* v. *Buzzell*, 60 Me. 209, 11 Am. Rep. 204; *Foss* v. *Hildreth*, 10 Allen (Mass.), 76; *George* v. *Jennings*, 4 Hun (N. Y.), 66; *Sullings* v. *Shakespeare*, 46 Mich. 408, 41 Am. Rep. 166, 9 N. W. 451; *Candrian* v. *Miller*, 98 Wis. 164, 168, 73 N. W. 1004; *Brown* v. *Independent Pub. Co.*, 48 Mont. 374, 138 Pac. 258.)

The very definition of slander is that the language charged as defamatory must be "false and unprivileged." Hence, if the language is either true, or if it is privileged, it does not answer the statutory definition of what constitutes slander.

It is not believed that a single decision of any court of last resort in modern times can be found which in any manner changes this general rule. The only cases that hold to the contrary are under statutes or constitutional provisions which, after stating that the truth may be given in evidence, contain the further qualifying statement: "When published with good motives and for justifiable ends shall be a defense." This was the case in *Jones etc. Co.* v. *Townsend's Admx.*, 21 Fla. 431, 436, 58 Am. Rep. 676, 677. This court has set the matter at rest in *Cooper* v. *Romney*, 49 Mont. 119, Ann. Cas. 1916A, 596, 141 Pac. 289, where it said: "No publication which is not false is a libel, and no publication which is privileged is a libel." The matter charged as libelous and slanderous is admitted to be true; hence, neither malice nor special damages can attach. (*Reynolds* v. *Publishers* (*George Knapp & Co.*), 155 Mo. App. 612, 135 S. W. 103; *Beecher* v. *Press Pub. Co.*, 60 App. Div. 536, 69 N. Y. Supp. 895; *Waters-Pierce Oil Co.* v. *Bridwell*, 107 Ark. 310, 155 S. W. 126; s. c., 103 Ark. 345, Ann. Cas. 1914B, 837, 147 S. W. 64; *Morah* v. *Steele*, 157 App. Div. 109, 141 N. Y. Supp. 868; 25 Cyc. 413.)

Messrs. Walsh, Nolan & Scallon, for Respondent, submitted a brief; *Mr. C. B. Nolan* argued the cause orally.

It is contended that the words as uttered are not slanderous. The words have to do with an insurance agent, and the allegation is made concerning him that he is guilty of the crime of rebating. This is the charge in the complaint. The words spoken are that he had laid himself liable for rebating on the policy. That the word "rebating" has a settled and fixed meaning which carries with it the imputation of criminal wrongdoing is not open to doubt. To say of an insurance agent that he is guilty of rebating or that he laid himself liable for rebating on the policy is to say of him that he has done something in the insurance world which the law prohibits and brands as a crime. We make this assertion because the laws of many states so declare, and we contend that to say of an insurance agent that he

is guilty of rebating or that he has laid himself liable for rebating is, in effect, saying that he has committed a crime under the laws of the state of Montana. The law such as we are here considering has been before the courts in the following cases: *Julian Insurance Commissioner* v. *Guarantee Life Ins. Co.*, 159 Ala. 533, 49 South. 234; *Laun* v. *Pacific Mutual Life Ins. Co.*, 131 Wis. 555, 9 L. R. A. (n. s.) 1204, 111 N. W. 660; *McNaughton* v. *Des Moines Life Ins. Co.*, 140 Wis. 214, 122 N. W. 764; *Thomson* v. *McLaughlin*, 13 Ga. App. 334, 79 S. E. 182; *Phillips & Co.* v. *Fishback*, 84 Wash. 124, 146 Pac. 181; *Security Life Ins. Co.* v. *Allen* (Tex. Civ.), 170 S. W. 131; *People* v. *American Life Ins. Co.*, 267 Ill. 504, 108 N. E. 679; *Equitable Life Assur. Society* v. *Commonwealth*, 121 Ky. 543, 89 S. W. 537; *Citizens' Life Ins. Co.* v. *Commissioner*, 128 Mich. 85, 87 N. W. 126; *Metropolitan Life Ins. Co.* v. *People*, 209 Ill. 42, 70 N. E. 643.

The statement was slanderous *per se*. We find that there is much diversity of opinion whether the same rule applies in the case of libel and slander as to statements being slanderous *per se*. It will be found upon investigation that much of this doubt has crept into the decisions by reason of the difference in the statutory definitions of libel and slander. Whatever the rule may be at common law, there certainly is no room for doubt on this score when we consider our statute in defining slander. Under our statute, charging one with the commission of a crime constitutes slander, and so, likewise, are statements falsely stating something which tends directly to injure one in respect to his office, or in reference to his trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to the office, trade or business that has a natural tendency to lessen its profit. We submit that charging that Smith had been guilty of rebating, charged him with the commission of a misdemeanor; and the charge being unprivileged and false, actionable slander was charged. (*Kelly* v. *Independent Pub. Co.*, 45 Mont. 127, Ann. Cas. 1913D, 1063, 38

L. R. A. (n. s.) 1160, 122 Pac. 735; *State* v. *Sheridan,* 14 Idaho, 222, 15 L. R. A. (n. s.) 497, 93 Pac. 656.)

MR. JUSTICE HURLY delivered the opinion of the court.

Plaintiff, in two counts, charges defendant with slander. In the first count it is alleged generally that the defendant said to one William Stuewe "that the plaintiff had been guilty of the crime of rebating, in that he (Smith), as an insurance agent, had given a rebate of two-thirds of the premium payable on a policy of insurance on the Granite Block in the city of Helena," the complaint further alleging that rebating is expressly declared to be a crime under the provisions of Chapter 15 of the Session Laws of 1909, and that the defendant, intentionally and maliciously intending to injure plaintiff, charged the plaintiff with crime; that the words spoken were false and unprivileged; and that in consequence of the speaking thereof plaintiff was injured in his reputation, rendered liable to criminal prosecution, and that said words tended to disgrace him, *etc.*

In the second count it is alleged that the defendant used the following language respecting the plaintiff: "Smith [meaning the plaintiff] is guilty of rebating, an illegal act [meaning thereby that plaintiff has been guilty of the crime of rebating]." This count further contains charges of injury and reference to the statute concerning rebating adverted to in the first count.

To this complaint the defendant filed an answer denying generally and specifically its allegations. The defendant further sets out the language which he claims he did use with reference to the matter set forth in the complaint; pleads that the same was privileged, and that the alleged defamatory words were true. There was reply.

From the testimony it appears that the Warranty Title Company, a corporation, was the owner of the Granite Block in the [1] city of Helena, and that the defendant was its secretary and treasurer and its agent in the handling of the same. The plaintiff was the agent of a fire insurance company, and solicited of the defendant the writing of insurance policies upon the

building, and the defendant, acting as such officer and agent, caused to be written by the plaintiff two policies of insurance in the sum of $36,000 each thereon in favor of the corporation owning the same; that the premium charged for the writing of each of said policies was $737.10, of which sums the plaintiff was entitled to receive twenty per cent as his commission.

It further appears that the defendant, as a condition for the giving permission to plaintiff to write the insurance policies in question and with the statement by defendant that unless such agreement could be made defendant would place the insurance with other agents, entered into an agreement with the plaintiff requiring him to pay over to defendant two-thirds of the commission so earned by the plaintiff. After the payment of the premium upon each of the policies in question, the plaintiff gave his check to the defendant in the sum of $98.20, being two-thirds of plaintiff's commission for writing each policy. The plaintiff, in explanation of the transaction, states that Mr. Kleinschmidt told him that he (Kleinschmidt) was the secretary of the Warranty Title Company; that he always had two-thirds of the commission upon policies written upon the building; and that the payment of this share of the commission would be a payment to him individually for placing the insurance.

It further appears in the testimony that, after the filing of plaintiff's complaint, knowledge of the contents thereof was brought to the attention of the state auditor, and that by reason of the same, at the expiration of Mr. Smith's existing license as an insurance agent, the state auditor refused to renew the same, and that the plaintiff up to the date of trial had been deprived of the right to engage in the insurance business in this state. This is concededly the effect of the testimony.

At the close of plaintiff's case, a motion for a nonsuit was made, which was denied, after which defendant introduced testimony when a motion for a directed verdict was made by defendant which was denied by the court. The case was submitted to a jury, which returned a verdict in favor of the plaintiff. From the judgment this appeal was taken.

In our view of the case we need only consider the motions referred to.

While the complaint refers to Chapter 15, Laws of 1909, an examination of the provisions of that Chapter discloses that the same applies only to life insurance companies, and the case was tried upon the theory that the question of rebating was governed by the provisions of section 4026, 4027 and 4028, Revised Codes of Montana 1907, which are as follows:

"4026. * * * No insurance company organized under the laws of this state, or doing business in this state, shall make or permit any discrimination or distinction in favor of individuals between insurance or property of the same class in the amount of premiums or rates charged for policies, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes; nor shall any such company or agent thereof make any contract of insurance or agreement as to such contract other than as plainly expressed in the policy issued thereon, nor shall any such company or agent pay or allow, offer to pay or allow, as inducement to insurance, any rebate of premium payable on the policy or any special favor or advantages in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy contract of insurance.

"4027. * * * Every corporation or officer or agent thereof which shall violate any of the provisions of this Act shall be fined in any sum not exceeding five hundred dollars to be recovered by an action in the name of the state, and on collection to be paid into the county treasury for the benefit of the common school fund.

"4028. * * * Every officer or agent of any such corporation who shall violate any of the provisions of this Act shall be deemed guilty of a misdemeanor."

Respondent, conceding the facts above stated, contends that his conduct did not constitute "rebating" or discrimination in favor of the assured corporation, but amounted to nothing more than a payment to defendant of a commission for assisting him

in obtaining the privilege of writing the insurance, and that such payment was not prohibited by law. With this contention we are unable to agree. The defendant was not in any sense a partner, servant, or employee of the plaintiff in the transaction or otherwise. Plaintiff knew that defendant was an officer of the assured, its treasurer and secretary, and its managing agent. He knew, or should have known, that defendant was bound to use good faith towards his company in all his business dealings pertaining thereto. He is presumed to have known that the statute prohibited his writing a policy of insurance at a rate lower than specified in the policy itself. Yet, to avoid the provisions of the statute, in a desire to obtain business, he accepted the check of the assured corporation, signed by defendant as treasurer, in payment of the premium, and then as a part of the same transaction immediately deducted from the amounts so paid two-thirds of his commission, and repaid the same to the assured's secretary, treasurer and managing agent. Conceding that defendant's conduct was reprehensible and sordid, and that he personally profited by the transaction, we fail to see how this may avail the plaintiff. In our view it does not change the situation in the least that the parties agreed that the rebate was made to defendant personally. Whether it be that the assured corporation or defendant personally profited by plaintiff's dividing his commission, plaintiff did "pay or allow, as an inducement to insurance" a "rebate of premiums," which act was prohibited by law.

Upon the oral argument respondent contended in effect that the prohibition against discrimination applies only to deduction from the share of the premium which the insurance company retains for carrying the risk. The agent's commission is as much a part of the premium paid by the assured as is the portion retained by the insurance company.

In *Equitable Life Assur. Soc., etc.*, v. *Commonwealth*, 121 Ky. 543, 89 S. W. 537, an agent of the insurance company wrote a policy of life insurance, rebating sixty per cent (apparently his commission upon the policy for that year) of the first year's pre-

mium to the assured. The Kentucky statute, passed upon while apparently applicable only to life insurance companies, is otherwise almost identical with our section 4026. The court, in discussing the facts, declared plainly and explicitly that such action by the agent constituted a criminal offense. (See, also, *United States Life Ins. Co., etc.*, v. *Commonwealth*, 28 Ky. Law Rep. 948, 90 S. W. 970; *Heffron* v. *Daly*, 133 Mich. 613, 95 N. W. 714; *State Life Ins. Co.* v. *Strong*, 127 Mich. 346, 86 N. W. 825; *Fourche River Lumber Co.* v. *Bryant Lbr. Co.*, 230 U. S. 316, 57 L. Ed. 1498, 33 Sup. Ct. Rep. 887 [see, also, Rose's U. S. Notes].)

The testimony therefore showing that plaintiff did rebate, [2] contrary to the provisions of the statute, it follows that defendant may not be amerced in damages for making the statement complained of.

The truth of the charge made by defendant having been established, the motion for nonsuit, made when plaintiff rested, should have been granted. Likewise, plaintiff's case not having been aided by the testimony adduced in defendant's behalf, the court erred in not granting the motion for a directed verdict made at the close of the testimony.

The judgment is reversed and the cause is remanded to the district court.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, MATTHEWS and COOPER concur.

BREIDENBACH ET AL., RESPONDENTS, v. UPPER VALLEY ORCHARDS CO., APPELLANT.

(No. 4,078.)

(Submitted January 15, 1920. Decided February 16, 1920.)

[187 Pac. 1008.]

Sales — Statute of Frauds — Promise to Answer for Another's Debt—Collateral Promise.

Statute of Frauds—Promise to Answer for Another's Debt—When Question of Law—When of Fact.

1. If the language employed in making a promise to pay the debt of another is such that by immemorial usage and common custom it has but one meaning, the character of the promise is to be determined as a question of law; where, however, it is such that reasonable minds might differ as to the meaning intended to be conveyed, its character is to be determined as a question of fact.

Same—When Promise Collateral.

2. Where goods were ordered by and delivered to an independent contractor performing work for defendant company, and charged to him on plaintiff's books, and plaintiff in a former action to recover their price brought suit against the contractor alone, looking to him primarily and the company only as guarantor, the promise of the manager of the company to see that plaintiff "got his money" was a collateral one which, not being in writing, was void under the statute of frauds.

Same—Extension of Credit to Buyer—Effect.

3. Where credit for goods was extended to the person who ordered them and to whom they were delivered, and not exclusively to him who was sought to be held liable for their price under an oral promise to see that the seller "got his money," the promise was void under the statute of frauds, even though the promise was the principal inducement for the sale.

[As to contemporary promise of one person to pay where benefit inures to another as a promise to answer for default of another within the statute of frauds, see notes in 15 L. R. A. (n. s.) 214; 32 L. R. A. (n. s.) 598.]

Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.

ACTION by J. A. Breidenbach and another, as copartners doing business under the firm name of Breidenbach Brothers, against the Upper Valley Orchards Company. From judgment for plaintiffs and order denying new trial, the defendant appeals. Judgment and order reversed and cause remanded.

Messrs. O'Hara & Madeen, for Appellant, submitted a brief; *Mr. Geo. T. Baggs,* of Counsel, argued the cause orally.

The defendant Upper Valley Orchards Company's motion for nonsuit should have been sustained. There is a variance, amounting to a total failure of proof, between the allegations of the complaint and the evidence adduced on the trial, and this is true whether the promise of the Upper Valley Orchards Company be construed to be an original promise or a collateral promise. The allegation in the complaint of a joint liability of the defendants for goods, wares and merchandise sold and delivered to them is not supported by proof that the goods were sold and delivered to one of the defendants under an express promise of the other defendant to pay for them, whether this express promise is in the nature of an original or collateral promise.

If the agreement be construed to be of such a nature as to make the defendant, Upper Valley Orchards Company, an original promisor, then the allegations of the complaint are insufficient to maintain the action, for the reason that the proof is clear and unambiguous that the goods were sold and delivered to one of the defendants only, and it is not alleged that this was done at the instance and request of the defendant sought to be charged in the action. Even with this allegation, it would be insufficient to support a judgment against the defendant, Upper Valley Orchards Company, without other facts from which a promise to pay might be implied. (*Conrad Nat. Bank* v. *Great Northern Ry. Co.*, 24 Mont. 178, 183, 61 Pac. 1.) The complaint may state a cause of action, but it does not state the cause of action which the proof tends to sustain.

If the agreement is construed to be a collateral promise on part of defendant, Upper Valley Orchards Company, that is, a guaranty of payment on its part, then the variance or failure of proof is unmistakable.

The plaintiff must recover, if at all, upon the cause of action set forth in their complaint, and not upon a cause of action developed on the trial of the case. (*Mondranx* v. *Goux,* 51 Cal.

151, 153; *Owen* v. *Meade*, 104 Cal. 179, 37 Pac. 923; *Maul* v. *Schultz*, 19 Mont. 335, 341, 48 Pac. 626; *Wortman* v. *Montana Cent. Ry. Co.*, 22 Mont. 266, 286, 56 Pac. 316; *Wahle* v. *Great Northern Ry. Co.*, 41 Mont. 326, 109 Pac. 713; *Gregory* v. *Chicago, M. St. P. Ry. Co.*, 42 Mont. 551, 113 Pac. 1123; *Haley* v. *McDermott*, 45 Mont. 217, 121 Pac. 1060.)

To overcome the inference that Ivanoff was the principal debtor derived from the fact that he was given credit on the books of the plaintiffs, proof must be very strong. (*Hardman* v. *Bradley*, 85 Ill. 162.)

Then in addition to this, there is the action brought by plaintiffs against Ivanoff on this identical account, which ought to be conclusive on the question. Courts have refused to apply the doctrine of primary liability because of the fact that the creditor had first brought suit against the party claimed to be the debtor, and garnished the promisor, as in this case, this conduct on the part of the creditor being held to be inconsistent with its being an original promise. (*Gray* v. *Herman*, 75 Wis. 453, 6 L. R. A. 691, 44 N. W. 248; *Preston* v. *Zekind*, 84 Mich. 641, 48 N. W. 180; *Dupuis* v. *Interior Construction etc. Co.*, 88 Mich. 103, 50 N. W. 108.)

Messrs. Wagner & Taylor, for Respondents, submitted a brief; *Mr. J. D. Taylor* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought by Breidenbach Bros., copartners, against the Upper Valley Orchards Company and Peter Ivanhoff, to recover $1,150.50 and to establish and foreclose a materialman's lien. The trial court denied the plaintiffs the right to a lien, but rendered a personal judgment against both defendants for $1,032 and costs. From that judgment and from an order denying it a new trial, the defendant Orchards Company appealed.

It is alleged in the complaint that between October 19 and November 20, 1914, plaintiffs sold and delivered to defendants goods, wares and merchandise (dynamite, fuse and caps) for which the defendants agreed to pay $1,150.50. The answer of the Orchards Company is substantially a general denial. Ivanhoff appeared by demurrer and, when this was overruled, failed to plead further.

Upon the trial these facts were made to appear: Ivanhoff had a contract to clear and plow certain lands for the Orchards Company, and in the prosecution of this work required the materials which furnish the subject matter of this litigation. He applied to the plaintiffs to secure the goods upon credit, but was informed by J. A. Breidenbach that they would have to be assured that they would get their money. Ivanhoff replied that he could arrange the matter with the Orchards Company, and a day or two later brought to the Breidenbach store Thos. M. Norton, manager for the company. What then transpired is told by J. A. Breidenbach in his testimony, as follows: "He [Norton] said to go ahead and let Mr. Ivanhoff have the stuff and he would see that we got the money for it." The goods were delivered in four installments, and on each occasion a slip was made out by plaintiffs upon which the goods were charged to Ivanhoff alone. When the account was transferred to the ledger it was entitled, "Peter Ivanhoff, c/o Upper Valley."

About December 1, 1914, plaintiffs brought an action against Ivanhoff alone to recover for these same goods, and made and filed the necessary affidavit for a writ of attachment. In the complaint in that action, they alleged that the goods were sold and delivered to Ivanhoff and that Ivanhoff promised to pay for them, and substantially the same averments appear in the affidavit. Concerning that action, J. A. Breidenbach testified: "When we brought this suit against Ivanhoff, we looked to him first as the man who owed us the money, and looked to Upper Valley Orchards Company as the guarantor." And again testified, "We looked to Mr. Ivanhoff first and then the Upper Valley Orchards Company to pay the account in accordance

with the conversation with Mr. Norton," and again, "The only reason that we seek to charge the Upper Valley Orchards Company for the price of dynamite is because Mr. Norton came into the store with Ivanhoff and said that he would see that we got our pay for it." The same witness also testified: "We sold dynamite, caps, and fuse to the defendant amounting to $1,150.07, as I remember it. It was sold to—Mr. Ivanhoff got the goods."

The complaint in the present action is drawn to conform to the theory of joint liability; but that theory was exploded when plaintiff J. A. Breidenbach testified as indicated above. It is impossible to find from his testimony that the goods were sold to defendants jointly. The only conclusion admissible is that the goods were sold to Ivanhoff, and that Norton agreed to pay for them in the first instance or agreed to pay for them, if Ivanhoff failed to do so.

It is not necessary now to consider whether Norton was [1] representing the company when he made the promise, and, if he was, whether he had authority to do so. Assuming that he was speaking for the company and with authority, the question then arises: What is the character of the agreement which he entered into with the plaintiffs? Did he promise to pay the debt of the company, or did he promise to pay Ivanhoff's debt? If the former, the promise was original and not within the inhibition of the statute of frauds. If the latter, the promise was collateral, and, not being in writing, was void under the express provisions of section 5017, Revised Codes.

Where the language employed in making the promise is unequivocal and such that by immemorial custom and common consent it has but one meaning, the character of the promise is to be determined as a question of law. (*Fortman* v. *Leggerini*, 51 Mont. 238, 152 Pac. 33.) But where the language is such that reasonable minds might differ as to the meaning intended to be conveyed, then the character of the promise is to be determined as a question of fact, depending upon the intention of the parties at the time the promise was made, as such intention is re-

vealed by the surrounding circumstances. (*McGowan Com. Co.* v. *Midland Coal Co.*, 41 Mont. 211, 108 Pac. 655.)

In the trial court the parties proceeded upon the theory that the character of the promise made by Norton was properly to be determined as a question of fact, and appellant now insists that the evidence is insufficient to warrant the court in submitting the question to the jury, and with this we agree.

What were the attending circumstances from which the [2] intention of plaintiffs and Norton is to be ascertained? (a) The negotiations had their inception in the application of Ivanhoff to plaintiffs for credit for himself, not to the company. (b) The goods were delivered to Ivanhoff. (c) They were charged to Ivanhoff, and not charged to the company. (d) Plaintiffs brought an action against Ivanhoff alone to enforce payment for the goods. (e) Plaintiffs looked to Ivanhoff primarily and to the company only as guarantor. Instead of establishing an original promise, this evidence leads to the conclusion that plaintiffs understood that Ivanhoff was to be held primarily liable and that the company would be called upon only in the event that Ivanhoff failed to discharge his obligation.

Counsel for respondents lay stress upon the testimony of Ivanhoff; but however it may reflect upon the transaction as between him and Norton, or as between him and the company, it does not, and from the very nature of the case cannot, shed light upon the intention of the plaintiffs at the time of their agreement with Norton. Ivanhoff was an independent contractor, and not an agent of the company. But aside from every other consideration, there is the insuperable objection that in this action Ivanhoff is pursued as a party to whom credit was given. In order [3] to bind the company for goods sold to Ivanhoff, it is indispensable that credit was given to the company exclusively. If any credit was given to Ivanhoff, the company is not liable, since its promise was not in writing; and this is so even though its promise may have been the principal inducement to the plaintiffs to deliver the goods to Ivanhoff. The rules of law which govern a transaction of this character were considered so recently

and stated so fully in *McGowan* v. *Midland Coal Co.*, above, and *Fortman* v. *Leggerini*, above, that a further citation of authority is unnecessary.

The judgment and order are reversed, and the cause is remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY and MATTHEWS concur.

MR. JUSTICE COOPER, being absent, takes no part in this decision.

SURMAN ET AL., APPELLANTS, *v.* CRUSE ET AL., RESPONDENTS.

(No. 4,085.)

(Submitted January 16, 1920. Decided February 16, 1920.)

[187 Pac. 890.]

Personal Injuries—Master and Servant—Mining—Negligence—Contributory Negligence — Safe Place Rule — Custom — New Trial—Newly Discovered Evidence—Instructions.

Trial—Instructions—How to be Considered.

1. The instructions to the jury must be considered in the light of the issues and the evidence, every paragraph being read with the context, and as constituting the single charge of the court.

Instructions—Abstract Propositions of Law.

2. Abstract propositions of law should not be subm'tted to the jury in the instructions of the court.

Personal Injuries—Master and Servant—Faulty Method in Conducting Work—When Negligence.

3. An employer has the right to conduct his business in his own way, provided the method he selects is reasonably safe; if so far faulty that it can be said to be negligence to pursue it, and injury results proximately therefrom to the employee, the employer is liable.

Same—Mines—Faulty Method—How Determinable.

4. Defendant was not required to select the best method or the safest appliances for holding a large rock in place in mine workings, and the question whether the method adopted was proper was determinable by

actual conditions, not by comparison with other methods which might have been used.

Same—Erroneous Instruction—When Harmless.

5. Though an instruction is erroneous in the sense that it is incomplete, the error becomes harmless if it is supplemented and made complete by other instructions given.

Same—Safe Place Rule—When Inapplicable.

6. The safe place rule *held* not to apply in the case of a timberman employed in a mine to make safe dangerous places in the workings, whether pointed out to him by another or discovered by himself, though it is incumbent upon the master to minimize the danger so far as practicable.

Same—Negligence—Custom does not Exonerate.

7. Custom never exonerates from the imputation of negligence.

Same—Custom—Instruction.

8. An instruction that if defendant had employed a method customarily employed by miners in making a dangerous place safe by spragging, no liability attached, provided it was a reasonably safe way in which the danger could be prevented was not objectionable as contrary to the rule declared in paragraph 7 above.

Appeal and Error—Erroneous Instruction—When not Reversible Error.

9. For errors in instructions not affecting appellant's substantial rights, a judgment will not be reversed.

New Trial — Newly Discovered Evidence — Affidavits to be Considered Together.

10. An affidavit made in support of a motion for a new trial on the ground of newly discovered evidence, and a second one made by the same affiant procured by the adverse party withdrawing or modifying statements in the first, must be considered together.

Same—Cumulative Evidence not Ground for New Trial.

11. Cumulative evidence affords no ground for a new trial on the ground of newly discovered evidence.

Personal Injuries—Contributory Negligence—How to be Pleaded.

12. Contributory negligence must be pleaded with the same degree of particularity required in charging negligence, and the party alleging it cannot prevail unless the particular acts of negligence, or one or more of them, set forth are established by his evidence.

Same—Negligence—Pleading.

13. Whether there is a sufficient charge of negligence in a personal injury case must be determined from the facts alleged, not from the use of the descriptive terms "negligently and carelessly."

Newly Discovered Evidence—When not Ground for New Trial.

14. Where alleged newly discovered evidence could only be employed in rebuttal to repel the imputation of contributory negligence in a particular not charged, and had no relevancy to the cause of action stated in the complaint, a new trial on the ground of newly discovered evidence was properly denied.

Appeal and Error—Erroneous Instructions—When not Ground for Reversal of Judgment.

15. Under section 6746, Revised Codes, for error in an instruction which was not specifically pointed out and excepted to at the settlement of the instructions, the supreme court may not reverse a judgment.

[On applicability of rule as to safe place, where servants are engaged in the work of removing dangerous conditions, see note in 25 L. R. A. (n. s.) 321.]

[On cumulative evidence as grounds for new trial in civil cases, see note in L. R. A. 1916C, 1162.]

Appeal from District Court, Lewis and Clark County; J. Miller Smith and W. H. Poorman, Judges.

ACTION by Dora Surman and others, as heirs at law of Stephen Surman, deceased, against Richard Cruse and others, administrators with will annexed of the estate of Thomas Cruse, deceased. From a judgment for defendants and from order denying them a new trial, plaintiffs appeal. Order and judgment affirmed.

Mr. Wellington D. Rankin, for Appellants, submitted an original and supplemental brief and argued the cause orally.

The defendant Cruse was bound to use reasonable care to conduct his business in a reasonably safe manner. A master has not the right to conduct his business in his own way, but must use reasonable care to select and use a reasonably safe method, and liability may be predicated upon a negligent method adopted for the performance of his work. This has been repeatedly held to be the law in this state. (*Verlinda* v. *Stone & Webster Eng. Corp.*, 44 Mont. 223, 119 Pac. 573; *Stewart* v. *Stone & Webster Eng. Corp.*, 44 Mont. 160, 119 Pac. 568; *Westlake* v. *Keating Gold Mining Co.*, 48 Mont. 120, 136 Pac. 38.) This general rule is stated in 26 Cyc. 1153, as follows: "So too if a master directs a servant to do certain work in a manner not reasonably safe, and the performance of the work in the manner directed is the proximate cause of injury to the servant, the master is guilty of actionable negligence." (*Fonts* v. *Southern Pac. Co.*, 30 Cal. App. 633, 159 Pac. 215.)

A master must adopt a method of performing his work which a reasonably prudent person would adopt, regardless of the method generally or customarily observed by others. (*Kinsel* v. *North Butte Mining Co.*, 44 Mont. 445, 120 Pac. 797, 805; *Austin* v. *Chicago, R. I. & P. Ry. Co.*, 93 Iowa, 236, 61 N. W. 849; *Lake Erie & W. R. Co.* v. *Mugg*, 132 Ind. 168, 31 N. E. 564; *Hosic* v. *Chicago, R. I. & P. Ry. Co.*, 75 Iowa, 683, 9 Am. St.

Rep. 518, 37 N. W. 963; *Dolphin* v. *Peacock Mining Co.*, 155 Wis. 439, 144 N. W. 1112; *East Tennessee, V. & G. Ry. Co.* v. *Kane*, 92 Ga. 187, 22 L. R. A. 315, 18 S. E. 18.)

The motion for new trial should have been granted on the ground of newly discovered evidence. Where evidence is material and could not have been discovered by the exercise of reasonable diligence, it is an abuse of discretion to refuse a new trial. (Hayne on New Trial, sec. 92, p. 439; *Waite* v. *Fish*, 17 S. D. 215, 95 N. W. 928; *In re McClellan's Estate*, 20 S. D. 498, 107 N. W. 681; *Kellogg* v. *Finn*, 22 S. D. 578, 133 Am. St. Rep. 945, 18 Ann. Cas. 363, 119 N. W. 545; *State* v. *Stowe*, 3 Wash. St. 206, 14 L. R. A. 609, 28 Pac. 337; *State* v. *Townsend*, 7 Wash. 462, 35 Pac. 367; *State* v. *Webb*, 20 Wash. 500, 55 Pac. 935.) The facts set out in the affidavit for newly discovered evidence cannot be controverted by a counter-affidavit and a question of fact thus tried by the court instead of the jury. (*In re McClellan's Estate, supra; Goldsworthy* v. *Town of Linden*, 75 Wis. 24, 43 N. W. 656; *Shafer* v. *Willis*, 124 Cal. 36, 56 Pac. 635; *People* v. *Sing Yow*, 145 Cal. 1, 78 Pac. 235.)

Messrs. Walsh, Nolan & Scallon, for Respondents, submitted a brief; *Mr. C. B. Nolan* argued the cause orally.

Mr. Surman was employed as timberman and as such his duties required him to make that particular place in the mine where the slab was cracked reasonably safe, and whatever risks attended upon the performance of that work, they were risks which he assumed by virtue of his employment as such timberman, and as to such work the doctrine of a safe place had no application. (See *Shaw* v. *New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515; *Gregory* v. *Chicago etc. Ry. Co.*, 42 Mont. 551, 113 Pac. 1123; *Finalyson* v. *Utica Mining & Milling Co.*, 67 Fed. 507, 14 C. C. A. 492; *Union Pac. R. Co.* v. *Jarvi*, 53 Fed. 65, 3 C. C. A. 433.) A case directly in point is presented in the case of *Metallic Gold Mining Co.* v. *Watson*, 51 Colo. 278, Ann. Cas. 1913A, 1276, 117 Pac. 609.

On the authorities submitted and on the undisputed facts disclosed by the record, the first ground of negligence is disposed of, that is, the failure to furnish a safe place in which to work. The contract of employment did not provide that a safe place should be furnished Mr. Surman. He was employed as a timberman and undertook to perform the duties incident to that employment. Mr. Cruse did not undertake to furnish a safe place. On the contrary, he advised Mr. Surman that his employment would require him to go to dangerous places in the mine so as to make them reasonably safe.

This brings up for consideration the second ground of negligence, and that is, that Surman was negligently ordered by the foreman to place a sprag against the rock, and that, in so directing him to place a sprag against the rock, a dangerous and unsafe method was adopted, a fact which the foreman knew and which Surman did not know, or, in the exercise of reasonable care and diligence, could not have ascertained. We quote as follows from the case of *Hightower* v. *Southern Ry. Co.*, 146 Ga. 279, L. R. A. 1917C, 481, 91 S. E. 52: "Where a servant is an adult of ordinary intelligence, he cannot relieve himself of the duty imposed by law in regard to assumption of risks on the ground that he is obeying orders of the master, or of a representative of the master, or because failure to obey will result in loss of employment."

Where the master and servant are possessed of equal knowledge of defects and danger, the servant assumes the risk, and the same is true where the servant has better means of knowledge than the master. (26 Cyc. 1202; Thompson on Negligence, sec. 4643.) If a servant places himself in a position where he is injured, his preceding actions must be considered, and if they show lack of care on his part, he is guilty of contributory negligence. (*Dummer* v. *Milwaukee Electric Ry. etc. Co.*, 108 Wis. 589, 84 N. W. 853; *Richmond Ry. etc. Co.* v. *Hudgins*, 100 Va. 409, 41 S. E. 736; *Chattanooga Electric Ry. Co.* v. *Cooper*, 100 Tenn. 308, 70 S. W. 72; *Chicago etc. Ry. Co.* v. *Corson*, 198 Ill. 98, 64 N. E. 739.) It is not a negligent act to direct a servant

to go to a place of danger to perform a dangerous task. (*Turner* v. *Southern Pac. Co.*, 142 Cal. 580, 76 Pac. 384; *Spencer* v. *Ohio etc. Ry. Co.*, 130 Ind. 181, 29 N. E. 915; *Slota* v. *Albert Lewis Lumber etc. Co.*, 215 Pa. 434, 64 Atl. 632; *Stevens* v. *Henningsen Produce Co.*, 53 Mont. 306, 163 Pac. 470.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Thomas Cruse in his lifetime owned and operated the Bald Mountain mine at Marysville. Stephen Surman was employed to work in the mine as a timberman, and while engaged in the discharge of his duties received injuries from which he died. This action was brought by his surviving widow and children to recover damages upon the theory that the death resulted from the employer's negligence. After the action was instituted Mr. Cruse died, and his personal representatives were substituted. The trial of the cause resulted in a general verdict for defendants, and from the judgment entered thereon and from an order denying a new trial, plaintiffs appealed.

The charging part of the complaint is to the effect that in a certain stope in the mine there was a large rock which had become loosened and was in a dangerous condition; that the danger was known to the employer but not known to Surman; that, notwithstanding these facts, Surman was ordered to place a sprag (a small stull) against the rock to hold it in place; that this method of procedure was unsafe and dangerous; that Surman undertook to execute the order, and while so engaged the rock fell upon him, causing the injuries which resulted in his death.

Paraphrased, the complaint charges negligence: (1) In ordering Surman into a known place of danger; and (2) in prescribing for his guidance a dangerous method of procedure. The first ground of negligence was eliminated by the evidence, which disclosed without controversy that Surman knew of the danger. This much is apparently conceded by counsel for plaintiffs in his supplementary brief, for he says that the action is based

upon "the failure of the defendant [Cruse] to select and use a reasonably safe method of performing the work in question."

The court submitted to the jury twenty-four instructions. Exceptions were taken to only two of them, 13 and 16, which are as follows:

"(13) You are instructed that Mr. Cruse had the right to conduct his business in his own way, and had the right to require Mr. Surman, as timberman, to perform such dangerous work, if any, which is usually done by timbermen in mines, and you are instructed that defendants cannot be held liable for any injury resulting solely from the dangerous character of the work that Mr. Surman was performing at the time that he suffered death.

"(16) You are further instructed that, if you find from the evidence in this case that the work which Mr. Surman was about to do in connection with making the place reasonably safe where the rock fell was work which he was required to do as timberman, and you further find from the evidence that the rock in the condition in which it was was likely to fall or was in a dangerous condition, and spragging of same was a reasonably safe way in which the danger of its falling could be prevented, and spragging in such a case was a method that was generally observed in order to prevent the rock from falling, in that event the risk of being injured by the falling rock was a risk which he assumed by virtue of his employment as timberman, and for the death of Mr. Surman under those circumstances no liability would arise."

1. It is elementary that the instructions are to be considered [1] In the light of the issues and the evidence (*Yoder* v. *Reynolds*, 28 Mont. 183, 72 Pac. 417), that every paragraph is to be read with the context, and that the several instructions are to be considered together as constituting the single charge of the court. (*Brockway* v. *Blair*, 53 Mont. 531, 165 Pac. 455.)

Much adverse criticism is directed to the opening statement in instruction 13: "Mr. Cruse had the right to conduct his [2, 3] business in his own way." As an abstract rule of law,

it is clearly correct. In *Jarrell* v. *Coal Co.*, 154 Mo. App. 552, 136 S. W. 754, it is said: "The right of an employer to conduct his own business in his own way is a rule pertaining to the relation of master and servant too well settled to call for discussion. But this right has its limitations."

Abstract rules of law ought not to be given to a jury (*First Nat. Bank* v. *Carroll*, 35 Mont. 302, 88 Pac. 1012), and that principle gains added emphasis in this instance, for, standing alone, the statement contains but half the truth. So long as injury does not result from the method employed, the master cannot be required to substitute for his own judgment the judgment of someone else, in the absence of statute prescribing a particular mode of procedure; but, whenever the master employs others to work for him, the law imposes upon him the duty to exercise reasonable care for their safety, and if his method is so far faulty that it can be said to be negligence to pursue it, and if the pursuit of that method results proximately in injury to the servant, the master is liable. (*Verlinda* v. *Stone & Webster Eng. Corp.*, 44 Mont. 223, 119 Pac. 573; *Westlake* v. *Keating G. Min. Co.*, 43 Mont. 120, 136 Pac. 38.)

As among several methods which might suggest themselves, [4] Mr. Cruse had the right to choose spragging in preference to blasting or any other method, provided spragging was a reasonably safe method of accomplishing the desired end. He was not required to select the best method or the safest appliances. The question whether the particular method prescribed was proper was to be determined by actual conditions, and not by comparison with other methods which might have been in use. (*Forquer* v. *Slater Brick Co.*, 37 Mont. 426, 97 Pac. 843; 3 Labatt on Master & Servant, sec. 931.)

If the opening clause of instruction 13 stood alone, no one would contend seriously that it states a correct principle as applied to the facts of this case; but it does not stand alone. The court cannot be expected to state the law fully in one instruction (*Frederick* v. *Hale*, 42 Mont. 153, 112 Pac. 70), and it is now too well settled to be open to argument that, though an

[5] instruction is erroneous in the sense that it is incomplete, but is supplemented and made complete by other instructions given, the error becomes harmless (*Fitschen* v. *Thomas*, 9 Mont. 52, 22 Pac. 450). In *Harrington* v. *Butte, A. & Pac. Ry. Co.*, 36 Mont. 478, 93 Pac. 640, this court said: "It is a familiar rule that, in reviewing a charge of a trial court, it will be examined as a whole. While one or more paragraphs, standing alone, may be inaccurate or even prejudicially erroneous, yet, if these are qualified and explained by the other portions of the charge *in pari materia*, and, taken together with them and the rest of the charge, fully and fairly submit the case to the jury, the verdict and judgment should be sustained."

Do the instructions, considered in their entirety, correctly limit the right of the employer to carry on his own business in his own way? By instruction 3 the jury were told that, if they found "that said method of taking care of said rock (spragging) was a dangerous method and likely to cause injury to one so caring for said rock, * * * then you will return your verdict in favor of plaintiffs and against the defendants." In instruction 16 the jury were told that, if they found that placing a sprag against the rock "was a reasonably safe way in which the danger of its falling could be prevented, * * * in that event the risk of being injured by the falling rock was a risk which he [Surman] assumed by virtue of his employment as timberman, and for the death of Mr. Surman under those circumstances no liability would arise." The jury must have understood from these instructions that Mr. Cruse had the right to select the method for securing this rock, provided the method which he selected was reasonably safe, and whether it was or was not reasonably safe was for them to determine from the evidence.

Surman's duties as timberman required him to render safe any dangerous places in the workings, whether pointed out to [6] him by another or discovered by himself. Under such circumstances it cannot be said that his employer was bound to furnish a safe place for Surman, who was employed for the ex-

press purpose of making it safe; in other words, the safe place rule could not be applied to his situation, as it is applied to a servant not engaged in the discharge of a nondelegable duty of the master. (*Thurman* v. *Pittsburg & Mont. C. Co.*, 41 Mont. 141, 108 Pac. 588; *De Sandro* v. *Missoula L. & W. Co.*, 48 Mont. 226, 136 Pac. 711.) By this we do not mean to infer that the master was relieved of his common-law duty altogether. It was still incumbent upon him to minimize the danger so far as practicable to do so, and to refrain from exposing the servant to injury from causes which might have been reasonably anticipated and guarded against; but the facts of this case do not admit of the application of the rule, as in *Morelli* v. *Twohy Bros. Co.*, 54 Mont. 366, 170 Pac. 757. Morelli was ordered into a dangerous place, without knowledge of the danger, without an opportunity to make an examination, and with the assurance of the master, who had made an examination, that the place was safe. Surman was ordered to a dangerous place with warning of the danger and for the express purpose of making it safe.

Instruction 16 would be prejudicially erroneous if it acquitted [7, 8] defendants of liability by reason of the fact that they adopted a method customarily employed in such cases. Custom never exonerates from the imputation of negligence. (*Conway v. Monidah Trust*, 52 Mont. 244, 157 Pac. 178.) But the instruction goes further, and directs the jury that, in addition to finding that the method employed was one generally observed in such cases, they must find that it was "a reasonably safe way in which the danger * * * could be prevented." Complaint is made that instruction 16 ignores the element of appreciation of the danger; but that phase of the case was covered by instruction 6, to which no exception was taken.

Considered with the other instructions given, we think that [9] 13 and 16 are not open to the criticism made upon them. Neither is a model of perspicuity, but it does not seem possible that the jury could have been misled by the charge as a whole. Section 6593, Revised Codes, provides: "The court must, in every stage of an action, disregard any error or defect in the plead-

ings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

2. A new trial was sought on the ground of newly discovered evidence.

Barney Heaney, employed in the mine but a few feet from [10] Surman at the time he was injured, made affidavit in support of the motion, and, after reading the testimony which he gave at the coroner's inquest, made a second affidavit in which he withdrew or materially modified many of the statements contained in the first. Assuming for the purposes of this case that counsel for appellants is correct in his contention that the evidence contained in an affidavit in support of a motion for a new trial cannot be controverted by counter-affidavits, still we think that the two affidavits made by Heaney should be considered together, and this, too, notwithstanding the fact that the second was procured by defendants.

In passing on the motion, the lower court was required to assume that, if a new trial were granted, and Heaney called as a witness, he would offer to testify to the facts disclosed by his [11] first affidavit as modified by the second. There is a statement contained in the first affidavit which is not modified—a statement which counsel for appellants deems material. It is to the effect that Heaney saw Surman sound the rock and make tests and examinations to ascertain whether it was likely to fall. Counsel for respondents in their brief criticise Surman for standing "in such close proximity to the rock which he did not sound and which he did not examine." In reply thereto counsel for appellants says: "We desire likewise to invite the court's attention to the fact that the deceased did sound the rock in question, contrary to the statement made by counsel on page 32 of their brief. Richard O'Connell, who was the partner working with Surman, testified as follows: 'Both of us made the examination, and I do not know which one it was who sounded the rock, Mr. Surman or me. We were both there, and he concluded it was safe, and I agreed with him.'" If O'Connell and Heaney

refer to the same examination, then Heaney's evidence would be merely cumulative, and afford no ground for a new trial. (*Garfield M. & M. Co.* v. *Hammer*, 6 Mont. 53, 8 Pac. 153.)

Heaney's statement, if material at all, could be employed only in rebuttal, to repel the imputation of contributory negligence. It has no relevancy whatever to the cause of action stated in the complaint. The rule is settled in this jurisdiction that [12–14] contributory negligence must be pleaded with the same degree of particularity as the plaintiff must employ in charging negligence (*Gleason* v. *Missouri R. P. Co.*, 42 Mont. 238, 112 Pac. 394), and that plaintiff in the one instance, and defendant in the other, must prevail, if at all, by evidence which tends to establish the particular acts of negligence charged, or one or more of them. (*Knuckey* v. *Butte El. Ry. Co.*, 41 Mont. 314, 109 Pac. 979; *Bracey* v. *Northwestern I. Co.*, 41 Mont. 338, 137 Am. St. Rep. 738, 109 Pac. 706.)

In attempting to charge that Surman was guilty of contributory negligence, defendants allege that, when the foreman discovered the dangerous condition of the rock, he ordered Surman to pry it out or place a sprag against it; that Surman failed to obey the order; that on the day following he was again given the same directions and again neglected to obey; that on the third day he was again given the order, and, while waiting for his assistant to procure the sprag, he stood in such a position that, should the rock fall, he would likely sustain injury, and that while in that position he was injured. It is not alleged that he was negligent in failing to examine the rock or that he was negligent in assuming the position which he occupied, without first having made an examination. Whether there is a sufficient charge of negligence must be determined from the facts alleged, not from the use of the descriptive terms "negligently and carelessly." It was altogether immaterial under the issues made by the pleadings whether Surman made an examination on the day he was injured or at any other time. He was not directed to the place to ascertain whether it was dangerous, but because it was known to be dangerous. The fact that he occupied a position

where he might be injured if the rock fell does not of itself impute negligence to him.

It does not aid appellants to say that an attempt was made [15] by instruction 11 to submit to the jury the question whether Surman had examined the rock. The instruction appears to be incomplete and is altogether erroneous; furthermore, an instruction upon the subject should not have been given; but this instruction was given without objection, and we are precluded by the statute from reversing the judgment because of the error. Section 6746, Revised Codes, provides: "No cause shall be reversed by the supreme court for any error in instructions, which was not specifically pointed out and excepted to at the settlement of the instructions as herein specified, and such error and exception incorporated in and settled in the bill of exceptions or statement of the case as herein provided."

Since the newly discovered evidence would be excluded as immaterial if a new trial were granted, the order denying the motion is affirmed, as is the judgment.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY and MATTHEWS concur.

MR. JUSTICE COOPER, being absent, takes no part in the foregoing decision.

CADDEL, APPELLANT, *v.* BROWN ET AL., RESPONDENTS.

(No. 4,087.)

(Submitted January 17, 1920. Decided February 16, 1920.)

[187 Pac. 897.]

Malicious Prosecution—Evidence—Insufficiency—Directed Verdict Proper.

1. Where the evidence in an action for malicious prosecution of plaintiff on a charge of cattle stealing showed that the county attorney had acted upon his own initiative, after a careful investigation and without consulting or advising with defendants, a directed verdict in favor of the latter was proper.

Appeal from District Court, Big Horn County; A. C. Spencer, Judge.

ACTION by John H. Caddel against A. G. Brown and C. M. Taintor. From a judgment for defendant and an order denying him a new trial, plaintiff appeals. Affirmed.

Mr. E. E. Enterline, Mr. C. F. Gillette, and *Mr. T. H. Burke,* for Appellant, submitted a brief; *Mr. Enterline* and *Mr. Gillette* argued the cause orally.

The court erred in sustaining the defendants' motion for directed verdict and entering judgment thereon. There was ample evidence to sustain the allegations of the complaint and to show that the criminal prosecution was instituted by the defendants maliciously and without probable cause. The jury had a right to draw an inference from the testimony introduced that the defendants procured Le Fors to make and filed the criminal complaint for the purpose of having the plaintiff in this action, the defendant in the criminal action, arrested. The admissions of Brown when he was interrogated by the witness Jordan clearly show that he made no denial of the fact that he had instituted the criminal prosecution, but, on the contrary, sought to excuse himself upon the ground that his codefendant, Taintor, had agreed to bear the expense of the prosecution. In

addition to that, Pageant, a witness for the defendants, testified that he was advised by the defendant, Brown, and this was before the criminal complaint was filed, that the steer was wanted as evidence in the case, and that he understood that they, of course meaning Brown and Taintor, "Were getting up a case against him [Caddel]." This evidence alone, not taking into consideration the other evidence in the case, was sufficient to submit the question to the jury as to whether or not the defendants had instigated the arrest of the plaintiff. (*Fisher* v. *Westmoreland*, 101 Miss. 180, Ann. Cas. 1914B, 636, 57 South. 563; *Robinson & Co.* v. *Greene*, 148 Ala. 434, 43 South. 797.)

The evidence further shows that the defendants employed attorneys Metz and Marshall, before the filing of the complaint, and that as such attorneys they advised the prosecution. This alone would be sufficient to render them liable. (*Eggett* v. *Allen*, 119 Wis. 625, 96 N. W. 803, 806; *Robinson & Co.* v. *Greene*, 148 Ala. 434, 43 South. 797.)

Were the facts such as would lead a man of ordinary care and prudence to believe or entertain an honest and strong suspicion that plaintiff was guilty of the crime charged against him? Plaintiff claimed he had at least a *prima facie* right to the steer, and made demand for it after it was taken from him and before the complaint was filed. This was a circumstance for consideration. (*Weaver* v. *Townsend*, 14 Wend. (N. Y.) 192; *Blunk* v. *Atchison, T. & S. F. Ry.*, 38 Fed. 311, 313.) There was no attempt of concealment of the animal on the part of the plaintiff. This, too, was a circumstance to be considered. (*Tabert* v. *Cooley*, 46 Minn. 366, 13 L. R. A. 463, 49 N. W. 124.) "Proof of plaintiff's good reputation for many years in the community went to show an improbability that the plaintiff would be guilty of the conduct embodied in the charge, and of this the defendant may be presumed to have been aware." (*McIntire* v. *Levering*, 148 Mass. 546, 12 Am. St. Rep. 594, 2 L. R. A. 517, 20 N. E. 191; *Israel* v. *Brooks*, 23 Ill. 575; *Blizzard* v. *Hays*, 46 Ind. 166, 15 Am. Rep. 291; *Woodworth* v. *Mills*, 61 Wis. 44, 50 Am. Rep.

135, 20 N. W. 728; *McIntosh* v. *Wales*, 21 Wyo. 397, Ann. Cas. 1916C, 273, 134 Pac. 274.)

There were disputed questions of fact involved upon the issue of want of probable cause, and that being the situation in the case, the cause should have been submitted to the jury. The question of probable cause, when there is no conflict in the evidence, no disputed facts, nor any doubt upon the evidence, the inference to be drawn from it, is one of law for the court and not of fact for the jury. (*Heyne* v. *Blair*, 62 N. Y. 19, 23; *Galley* v. *Brennan*, 216 N. Y. 118, 110 N. E. 179.) "The question of probable cause is a mixed question of law and fact, and when such a defense is alleged, and evidence has been offered in relation thereto, its credibility is to be considered and determined by the jury, under proper instructions as to what facts, if they exist, constitute or fail to constitute probable cause; and when, as in this case, the defendant's belief of the facts relied on by the plaintiff to prove a want of probable cause is essential, it is always a question of fact, to be submitted to the jury for determination." (*Acker* v. *Gundy* (Pa. Sup.), 12 Atl. 595; *Stewart* v. *Sonneborn*, 98 U. S. 187, 25 L. Ed. 116 [see, also, Rose's U. S. Notes]; *Walker* v. *Camp*, 69 Iowa, 741, 27 N. W. 800; *Murray* v. *Long*, 1 Wend. (N. Y.) 140; *Jackson* v. *Bell*, 5 S. D. 257, 58 N. W. 671, 673.)

Messrs. Goddard & Clark, *Mr. D. P. B. Marshall* and *Mr. W. S. Metz*, for Respondents, submitted a brief; *Mr. Metz* argued the cause orally.

The district court had no discretion, but was compelled under the evidence and the law to instruct the jury to return a verdict in favor of the defendants Brown and Taintor. There was no evidence whatever to prove any malice on the part of the defendants Taintor or Brown and no evidence whatever of a want of probable cause to believe the plaintiff guilty of the charges set forth in the complaint. Upon these facts they employed counsel to aid the prosecuting attorney in the prosecution. The burden of proving malice and want of probable cause

rests on the plaintiff, and he has wholly failed to prove either. (*Brown* v. *Selfridge*, 224 U. S. 189, 56 L. Ed. 727, 32 Sup. Ct. Rep. 444 [see, also, Rose's U. S. Notes]; *Bowers* v. *Walker*, 192 Mo. App. 230, 182 S. W. 116; *Sims* v. *Jay*, 53 Okl. 183, 155 Pac. 615; *Boyer* v. *Bugher*, 19 Wyo. 463, 120 Pac. 171; *Weaver* v. *Montana Cent. Ry. Co.*, 20 Mont. 163, 50 Pac. 414.) In a clear case, such as this case, the question of want of probable cause is one of law for the court. (*Brown* v. *Selfridge*, 224 U. S. 189, 56 L. Ed. 727, 32 Sup. Ct. Rep. 444 [see, also, Rose's U. S. Notes].)

The undisputed evidence shows that the criminal case was instituted by the county attorney and by Mr. Le Fors, the stock detective, and the plaintiff Caddel wholly failed to prove any case whatever under the allegations of his complaint. Even if Mr. Brown and Taintor, the respondents, had instituted the criminal prosecution upon the advice of the prosecuting attorney, this would be a complete defense and would constitute probable cause. (*Ambs* v. *Atchison, T. & S. F. R. Co.*, 114 Fed. 317; *Stewart* v. *Sonneborn*, 98 U. S. 187, 25 L. Ed. 116 [see, also, Rose's U. S. Notes]; *Hicks* v. *Brantley*, 102 Ga. 264, 29 S. E. 459; *Fowles* v. *Hayden*, 129 Mich. 586, 89 N. W. 339; *Shea* v. *Morand*, 191 Ill. App. 11; *Hightower* v. *Union Savings etc. Co.*, 88 Wash. 179, Ann. Cas. 1918A, 489, 152 Pac. 1015.) In this case the evidence that was submitted to the county attorney and to the other attorneys, Mr. Marshall and Judge Metz, was a full and fair statement of all the facts and was considered by them sufficient to warrant a prosecution of the plaintiff, Caddel. And the advice of an attorney made in good faith is always a good defense. (*Dunlap* v. *New Zealand etc. Ins. Co.*, 109 Cal. 365, 42 Pac. 29; *Hess* v. *Oregon G. Baking Co.*, 31 Or. 503, 49 Pac. 803; *Brady* v. *Georgia Home Ins. Co.*, 24 Tex. Civ. 464, 59 S. W. 914; *Rogers* v. *Mullins*, 26 Tex. Civ. 250, 63 S. W. 897; *Brinsley* v. *Schulz*, 124 Wis. 426, 102 N. W. 918; *Shea* v. *Morand*, 191 Ill. App. 11; *Carrigan* v. *Graham*, 166 Ky. 333, 179 S. W. 198.) The advice of a prosecuting attorney constitutes probable cause. (*Ambs* v. *Atchison, T. & S. F. R. Co.*, 114 Fed. 317; *Stewart* v.

Sonneborn, supra; Fowles v. *Hayden, supra; Hightower* v. *Union Savings & T. Co.*, 88 Wash. 179, Ann. Cas. 1918A, 489, 152 Pac. 1015; *Schippel* v. *Norton*, 38 Kan. 567, 16 Pac. 804–806.)

What constitutes probable cause is a question of law for the court. (*Michael* v. *Matson*, 81 Kan. 360, L. R. A. 1915D, 1, 105 Pac. 537; *Martin* v. *Corscadden*, 34 Mont. 308, 320, 86 Pac. 33; *Smith* v. *Munch*, 65 Minn. 256, 68 N. W. 19; *Blunk* v. *Atchison, T. & S. F. Ry. Co.*, 38 Fed. 311; *Boyer* v. *Bugher*, 19 Wyo. 463, 120 Pac. 171; *Johnson* v. *Southern Pac. Co.*, 157 Cal. 333, 107 Pac. 611; *Ross* v. *Hixon*, 46 Kan. 550, 26 Am. St. Rep. 123, 12 L. R. A. 760, 26 Pac. 955.)

MR. JUSTICE MATTHEWS delivered the opinion of the court.

From the transcript it appears that on July 10, 1915, one Joe Le Fors swore to a complaint in a justice's court of Big Horn county, charging one John H. Caddel with the larceny of a steer belonging to the wife of respondent Brown. Preliminary hearing was had and the magistrate dismissed the complaint. Thereupon Caddel brought his action charging that respondents "maliciously and without probable cause, caused, instigated and procured the said Le Fors to make and file" the complaint. At the close of appellant's testimony, respondents moved for judgment of nonsuit, which motion was overruled; having introduced testimony, respondents moved for a directed verdict, which motion was sustained; directed verdict returned and judgment thereon entered. Appellant then moved for a new trial, which motion was denied. He appeals from the judgment and from the order denying his motion for a new trial.

[1] It appears from the evidence that Le Fors was a stock detective, whose salary was paid partly by the state of Wyoming and partly by an association of stockmen in that state; while one Moses held a like position in Montana, receiving some part of the salary from an association of which Brown and Taintor were members. By a private agreement, these two men covered

Southern Montana and Northern Wyoming, jointly. In June of 1915, one Thad Shipman made an alleged confession to Moses of a partnership between himself and Caddel to steal unbranded calves and colts, dividing the spoils. He made an affidavit setting out in detail, among other alleged transactions, the taking of the animal in question from a cow belonging to Mrs. Brown, and naming several men who could corroborate him as to the ownership of the cow and the identification of the animal as her calf. Moses turned the affidavit over to Le Fors, who was then staying nights at the Taintor place in Montana, to handle the matter alleged. Le Fors investigated the several charges, interviewed the parties named, and, it seems, consulted two attorneys in Sheridan, Wyoming—W. S. Metz and D. P. B. Marshall. Metz was representing the man Shipman, while Marshall's connection with the matter is not entirely clear. On cross-examination as a witness for the defense, in answer to a question concerning his activity in getting the witnesses together for consultation with County Attorney Bunston, of Big Horn county, Marshall answered: "I felt that I was working in the interest of my client, Mr. Brown, who had been a client in other matters, and also doing what the county attorney had requested." He met Bunston in Billings and laid the matter before him, giving him a copy of the Shipman affidavit. As to whether Marshall went to Billings for that purpose or on other business, as to his purpose in laying the matter before the county attorney at all, and as to who, if anyone, paid his expenses on that trip, the record is silent.

Bunston did not take Marshall's version of the facts, but stated that he desired to talk with the parties named personally and requested Marshall to get them together at Sheridan. This Marshall did, and Bunston made an independent investigation; talked with all of the parties named, secured affidavits, and determined in his own mind that the evidence was sufficient on which to proceed as county attorney, and so advised Metz and Marshall. In consulting with Brown, his only inquiry was as to the ownership of the brand alleged to have been on the

mother of the animal in question, and it does not appear that either Brown or Taintor were advised or knew, prior to the filing of the complaint, that a criminal proceeding was to be instituted.

The theory of the appellant is that Le Fors, Metz and Marshall were acting as agents of respondents. The only evidence introduced to support this theory is that, prior to the commencement of the action, Taintor directed certain men to get Brown and one Jack Burke, who, it was said, could identify the animal, and go to Caddel's place and get the steer; that Caddel sent a man to demand its return and, before refusal, Brown consulted Le Fors and Moses; that, after the commencement of the action, respondents employed Metz and Marshall to assist in the prosecution. Two witnesses, employees of Caddel, testified that, on the day of the preliminary examination, Brown, in a barroom, stated that Taintor had told him to go ahead with the prosecution, and that he (Taintor) would stand all the expenses. It is not contended that the evidence discloses an agreement to this effect before the filing of the criminal complaint, and Brown testified that all he said was that he and Taintor were to pay the private attorneys, half and half.

Marshall, though not employed by Brown, "felt" that he was working in the interest of his client; but his only connection with the case was to call certain matters to the attention of the proper public official. Metz was employed by Shipman and his activities were on behalf of his client. Le Fors was acting in the interest of the stock associations generally and signed the complaint at the suggestion of the county attorney.

County Attorney Bunston testified that he acted on his own initiative, without consulting or advising with Brown or Taintor, and only after a careful and independent investigation, and determination that he had a case calling for action in his official capacity; and he proceeded in the matter without as much as advising respondents that he proposed to do so.

The fact that respondents employed private counsel in the case might import malice, had they been instrumental in procuring the complaint to be filed. Under all the facts disclosed

in the record, they were not even consulted, and what then took place, after the filing of the complaint, is not material to the issues in this case.

The trial court had the opportunity to consider the evidence on the motion for judgment of nonsuit. On motion for directed verdict and again on motion for a new trial, and, in the light of the facts disclosed in the record, we find no error in its rulings on these motions.

Other errors are assigned; but, as appellant failed to connect the respondents with the institution of the proceeding complained of, it is not necessary that they be considered.

The judgment and order denying a new trial are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY and HURLY concur.

MR. JUSTICE COOPER, being absent, takes no part in the foregoing decision.

IN RE ESTATE OF MURPHY.

(No. 4,074.)

(Submitted January 15, 1920. Decided February 16, 1920.)

[188 Pac. 146.]

Probate Proceedings — Executors and Administrators — Settlement of Accounts—Record on Appeal—"Party Aggrieved"—Decree—Estoppel—Res Adjudicata—Distribution of Estate—When Complete—Supreme Court—Jurisdiction—Rehearings.

Probate Proceedings—Executors and Administrators—Settlement of Accounts—Record on Appeal.

1. The record on appeal from an order settling the final account of an executor which contained the papers used at the hearing properly authenticated by the clerk of the court was sufficient, it not being necessary to bring up the whole record of the lower court.

Same—Record on Appeal.

2. Errors in former accounts of an executor are not open for review on appeal from an order settling a subsequent one; hence matters pertaining to them are not properly a part of the record.

Same—Appeal—"Party Aggrieved."

3. A son and heir at law who was pecuniarily and materially affected by a decree settling the final account of the executor and distributing the estate was a "party aggrieved" by, or a person interested in, the decree, within the meaning of the statute allowing an appeal to such person in probate matters.

Same—Appeal—*Res Adjudicata.*

4. An heir who permitted the will of his father to be probated without contest, accounts of the executor settled and allowed, and partial distribution of the assets made without timely objection or appeal, was foreclosed from attacking such proceedings on appeal from an order settling the final account of the executor and making final distribution.

Same—Decree—Statute of Limitations.

5. On the expiration of one year within which a will after probate may be contested, as provided by section 7407, Revised Codes, which is in effect a statute of limitations, the running of which commences with the date of the admission of the will to probate, the probate becomes final and is not open to either direct or collateral attack.

Supreme Court—Jurisdiction—Appeal.

6. The supreme court has appellate jurisdiction only, except as to those matters over which original jurisdiction is expressly conferred, and will therefore not consider any question on appeal in a civil case not raised in the trial court.

Probate Proceedings—Attack on Will—Estoppel.

7. Where the probate of a will leaving property in trust was not contested, and after the estate had been administered upon under the terms of the will and all of the property was out of the hands of the executor, appellant was estopped, on appeal from an order settling the final account of the executor, to attack the provisions of the will creating the trust.

Same—Confirming Action of Executor—Harmless Error.

8. *Held*, that the action of the district court confirming that of an executor in turning property of the estate in his charge over to testamentary trustees without first obtaining an order of distribution, was harmless, it appearing that the executor reported his action to the court, which thereafter approved it.

Same—Distribution of Estate—Worthless Note.

9. Where all debts, bequests and payments provided for under a will had been paid and the only property in the hands of the executor was a worthless note, which was disposed of by the decree of final distribution, complaint that the estate was not ready to be closed, that the property had not been distributed and that the executor should not have been discharged, *held* without merit.

Appeal—Rehearing—What will not be Considered.

10. On petition for rehearing, the supreme court will not consider grounds not presented on the original hearing. (On Motion for Rehearing.)

Appeal from District Court, Lewis and Clark County; W. H. Poorman, Judge.

IN THE MATTER of the estate of John T. Murphy, deceased. From a decree finally settling the accounts of the executor, John T. Murphy, Jr., appeals. Affirmed.

Messrs. Walsh, Nolan & Scallon and *Mr. Frederick H. Drake,* for Appellant, submitted a brief and one in reply to that of Respondents; *Mr. Wm. Scallon* argued the cause orally.

Mr. Wm. Wallace, Jr., Mr. John G. Brown and *Mr. T. B. Weir,* for Respondents, submitted a brief; *Mr. Weir* argued the cause orally.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

John T. Murphy died May 22, 1914, leaving a will by the terms of which one-fourth of his estate, after the payment of certain small bequests, was left to his wife, Clara C. Murphy, and the remaining three-fourths to a board of trustees, for the use and benefit of his children and grandchildren. The two daughters of deceased were each to receive the income from the one-third thereof until they reached the age of fifty years, when the principal would be turned over to them, or, if either married before reaching that age, such daughter would receive the one-half of her share on marriage, and the other half on attaining the age of fifty years. The income from the other third of the residue was to be divided between the son, John T. Murphy, Jr., and his two minor children; the children's half of the principal to go to them equally on reaching the age of twenty-one, while the son (this appellant) would receive but the income during his lifetime, the principal to go to his children on his death. The will provided that the trust created should continue for a period of ten years, "and for such a reasonable period thereafter as may be necessary to enable my trustees to complete the trust confided to them, as herein provided, except to the extent, if at all, that the same shall be sooner terminated as to any one or more of my children," and provided for the successors to the trustees named.

Petition for probate of the will was filed May 27, 1914, and notice duly given setting the matter for hearing for June 6, 1914; no objections being filed, the will was admitted to probate on the last-mentioned date, and the executor therein named was duly appointed and qualified. More than one year has elapsed without the filing of a contest of the will by appellant or any other person interested in the estate.

On May 21, 1915, the executor filed his first annual account and report to the court, in which he recited, among other things: "By partial distribution: Clara C. Murphy, 181,000; A. L. Smith, Massena Bullard, and Rolla P. Heren, trustees, $699,375," which last amount was receipted for to the executor by the trustees named. June 1, 1915, was set by the court for hearing on the account, and notice thereof duly given by the clerk of the court. No exceptions were filed to the account, and no contest thereof instituted, and on the day set for hearing the account was approved, settled and allowed by the court. On September 3, 1915, the executor filed petition for order of partial distribution, relating, however, only to certain real estate sold by the trustees. The day of hearing was set and notice given; no objections were filed, and the order was duly made and entered on the day set for the hearing. On February 16, 1917, the executor filed his final report and account and petition, setting forth that all claims against the estate had been paid, as well as all the expenses of administration, showing distribution of the net income from moneys on hand to the children of deceased, including appellant, in the manner provided by the will, and distribution of the remainder of the estate to the widow and the trustees, as follows: "Clara C. Murphy, * * * $152,035.92; * * * trustees, as per vouchers, * * * $456,107.74." The report and account further show the only property remaining in the hands of the executor to be a note for $1,000, then in the bankruptcy court, which the petition alleged was of no value, and that the estate was ready to be closed. The executor further petitioned that final distribution of the estate be made and that he be finally discharged. February 27, 1917, was set as the day

for hearing on the account and petition, and notice thereof duly given by the clerk of the court in the manner prescribed by law. No exceptions in writing to the account were filed, and no contest thereof instituted, and on said day the account and petition were heard, and decree made and entered, settling, allowing and approving the account and report, and all acts of the executor, making final distribution of the estate, and reciting that "the said A. L. Smith is fully and finally discharged from his trust as executor."

On April 26, 1917, just within the sixty-day limit, under section 7713, Revised Codes, appellant filed his notice of appeal from the final decree, in which he designates four appeals, and on which he filed four undertakings on appeal: (1) From the settlement of the account; (2) from the decree of distribution; (3) from the discharge of the executor; and (4) from the whole of the decree.

The respondent contends that the appeal should not be entertained for the reason:

1. That there is no authentic record before the court for consideration; that there is no "bill of exceptions." As there were [1] no objections or exceptions taken in the lower court, there could be no settled bill of exceptions.

The transcript contains practically all of the papers in the probate proceedings, certainly all of the record in this matter which was, or could have been, used on the hearing; it is duly certified by the clerk of the court, who was the legal custodian of the records. This is a sufficient record and is properly authenticated. In *In re Dougherty's Estate*, 34 Mont. 336, 86 Pac. 38, this court said: "While there is no such thing, technically, as a judgment-roll in probate proceedings, the successive determinations in the course of them, whenever the statute directly or by implication declares them final, must be regarded as final judgments, and the portions of the record upon which they are based must on appeal be regarded as the record for the particular determination. It would be idle to require that they

should be authenticated by bills of exceptions in order to make them a part of the record, since they are already such."

It is not necessary to bring up the whole record of the lower court. (*Estate of Healy*, 122 Cal. 162, 54 Pac. 736; *Estate of Osburn*, 36 Or. 8, 58 Pac. 521; *Estate of Reese*, 9 Utah, 171, 33 Pac. 698; *Estate of Levison*, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479; *Estate of Plunkett*, 33 Or. 414, 54 Pac. 152.)

The record, authenticated by the clerk, is a sufficient record in all such cases; but here we have considerable more of the record than should have been certified to this court. The record upon appeal should consist only of the proceedings before the court at the time when the order complained of was made. (*Estate of Delaney*, 110 Cal. 563, 42 Pac. 981.) Errors in [2] former accounts cannot be considered on an appeal from an order settling a subsequent account, as the order on the former account was conclusive. (Sec. 7649, Rev. Codes; *Bordeaux* v. *Bordeaux*, 32 Mont. 159, 80 Pac. 6; *Estate of Grant*, 131 Cal. 426, 63 Pac. 731; *In re Bell's Estate*, 142 Cal. 97, 75 Pac. 679; *Forrester* v. *Forrester*, 40 Ala. 557; *Kellett* v. *Rathburn*, 4 Paige (N. Y.), 107.) The appellant was in no position to present any question arising out of the action of the executor, as reported to the court in his first annual account, and records of those transactions should not have been included in the certified record.

2. Respondent asserts, also, that it does not appear from the record that appellant was a "party aggrieved" by, or person [3] interested in, the decree. A person interested, within the meaning of the statute allowing an appeal from a decree of the probate court, is one who has some legal right, or is under some legal liability, that may be enlarged or diminished by the decree. (*In re Clark's Estate*, 79 Vt. 62, 118 Am. St. Rep. 938, 64 Atl. 231.) This refers to a pecuniary interest which might be established, in whole or in part, by the decree. (*Briard* v. *Goodale*, 86 Me. 100, 41 Am. St. Rep. 526, 29 Atl. 946.)

It appears from the record that appellant was a son and heir at law of deceased, and that his rights were pecuniarily and

materially affected by the decree, and, if he took the proper course to secure his rights, is certainly a "party aggrieved" and entitled to prosecute his appeal.

3. The respondent contends that the appeal cannot be con-
[4] sidered by us for any purpose, for the reason that the appellant did not, in the court below, comply with the provisions of section 7647 of the Revised Codes, which reads as follows: "On the day appointed, or any subsequent day to which the hearing may be postponed by the court or judge, any person interested in the estate may appear and file his exceptions in writing to the account, and contest the same." The section quoted is the only one referred to in respondent's brief; however, sections 7645, 7648 and 7649 have to do with the same subject, and throw some light upon the duties of a party desiring to contest the account of an executor or administrator. Section 7648 provides that "All matters * * * may be contested by the heirs *for cause.* * * * The hearing and *allegations* of the *respective parties* may be postponed from time to time," *etc.*

Section 7649 provides that "the settlement of the account and the allowance thereof by the court or judge, *or upon appeal,* is conclusive against all persons in any way interested in the estate," *etc.*, except as to those laboring under some disability.

What, then, are the rights of an heir under the facts shown in the record; that is to say, where the heir sat calmly by and permitted the will to be probated, the several accounts and petitions of the executor to be settled and allowed, the estate to be fully settled, the assets distributed, and the executor finally discharged from his trust, before making any objection to the proceedings?

The right of appeal rests solely upon statute (*Estate of Tuohy,* 23 Mont. 305, 58 Pac. 722; *State ex rel. Jackson* v. *Kennie,* 24 Mont. 45, 60 Pac. 589; *In re Searles,* 46 Mont. 322, 127 Pac. 902), and is therefore dependent upon compliance with the provisions of the statutes (Woerner on Wills and Administration, pp. 1192, 1198; *Creek* v. *Bozeman Water Co.,* 22 Mont. 327, 56 Pac. 363).

Section 7098, Revised Codes, provides generally for all appeals in both civil and probate matters, and is contained in Part II of the Codes; while Part III covers probate proceedings. Section 7711, in Part III, provides that "Except as otherwise provided in this Title, the provisions of Part II of this Code are applicable to and constitute the rules of practice in the proceedings mentioned in this Title."

Section 7712, likewise provides that "the provisions of Part II * * * relative to new trials and appeals—except in so far as they are inconsistent with the provisions of this Title—apply to proceedings mentioned in this Title."

Section 7714 declares that "all issues * * * joined in probate proceedings must be tried in conformity with the requirements of Article II, Chapter II of this Title"—which Article deals with the contest of wills, and provides for the filing of written objections and the joinder of issue and trial in contest proceedings.

We find, then, that unless otherwise provided for in the Title on probate proceedings, the rules of practice in civil actions apply to and govern the practice in probate proceedings, and that all issues joined in probate proceedings must be tried in conformity with the requirements laid down for the trial of will contest cases. We find, further, that in probating an estate the executor or administrator must make accounts and reports of his actions to the court, and that, when the same are filed, the court must set a day certain for a hearing thereon, at which time any party interested may file written exceptions to the account and contest the same. These are positive provisions of the Chapter on probating estates, and are also in conformity with the practice prescribed for the contest of a will. That all parties interested may be advised and given the opportunity to appear and file exceptions, the clerk of the court is required by section 7646, Revised Codes, to post notice of the date set, reciting all the facts necessary to advise the interested parties of what has been done and what it is proposed shall be done at that time in the estate matter.

We may logically assume that the filing of the account by the executor takes the place of the filing of a complaint under the civil practice, and that the notice—which is a notice to all parties interested—performs the function of a summons in civil cases, and that appellant stands in default, both as to the admission of the will to probate and as to the subsequent proceedings thereunder, up to and including the filing of the decree of settlement of the first annual account. The time for appealing from such action having long since expired, appellant is foreclosed from in any manner attacking those proceedings. They are *res adjudicata*, so far as this proceeding is concerned. So, also, as to the contest of the will itself.

Section 7407, Revised Codes, provides for the contest of a [5] will after probate, at any time within one year. This is, in effect, a statute of limitations, the running of which commences with the date of the admission of the will to probate. (*Columbia University* v. *Taylor*, 25 App. D. C. 124; *Spaulding* v. *White*, 173 Ill. 127, 50 N. E. 224.) After the expiration of the time fixed by the statute, the probate becomes final and is not open to further attack, either directly or collaterally. (*Bent* v. *Thompson*, 138 U. S. 114, 34 L. Ed. 902, 11 Sup. Ct. Rep. 238 [see, also, Rose's U. S. Notes]; *In re Dunsmuir's Estate*, 149 Cal. 67, 84 Pac. 657; *Focha* v. *Focha's Estate*, 8 Cal. App. 576, 97 Pac. 321; *Estate of Ricks*, 160 Cal. 467, 117 Pac. 539.)

But it is contended, in argument, that this proceeding is not [6, 7] an attack on the validity of the will, but merely upon that portion thereof creating the trust. Whichever view we take of the proceeding, the result sought to be accomplished is the same; that is, to take the property, left in trust, out of the operation of the trust and dispose thereof by a re-administration of the estate after the estate has been administered upon under the terms of the will, and all of the property is out of the hands of the executor, because of the alleged invalidity of certain important provisions of the will, and under which proceedings, if had, the bulk of the testator's property would be required to be reassembled and redistributed in manner other than that he in-

tended it should be. This question is presented for the first time on this appeal; no appropriate proceeding was commenced in a court of competent jurisdiction to determine the matter, but it is sought to be presented on this appeal from the final decree of distribution and discharge made in the probate court, or the district court sitting in probate. Had the application been made to this court within the time allowed for the contesting of the will, the matter could not have been determined in this court, for it has appellate jurisdiction only, except as to those matters over which original jurisdiction is expressly conferred (sec. 2, Art. VIII, Const.; *Titus* v. *Latimer*, 5 Tex. 433), and can only consider such matters as are properly brought before it on appeal. The right to appeal rests solely upon the statute. (*Estate of Tuohy, supra; In re Searles, supra; State ex rel. Jackson* v. *Kennie, supra.*)

The rules of practice in civil actions are expressly made applicable to probate proceedings (sec. 7711, Rev. Codes), as are the provisions relative to new trials and appeals (sec. 7712). In civil actions, the general rule is that the appellate court will only consider such questions as were raised in the lower court; the all-sufficient reason for the existence of the rule being that, had the question been raised in the lower court, the objection might easily have been remedied there. (2 R. C. L., sec. 52, pp. 69–71.)

The question of the validity or invalidity of the provisions of the will complained of should have been raised by appropriate proceedings in the district court, under the statutes providing therefor, and where the question could have been heard and determined, and from which determination an appeal would lie to this court.

This proceeding depends for its foundation on the allegation that the will is, as to the provisions mentioned, illegal and void. In the case of *Dean* v. *Swayne*, 67 Kan. 241, 72 Pac. 780, the facts were somewhat similar, and the relief sought almost identical with the case before us. Decedent having left his property to his sister, who was a member of an Order of Sisters in England, and provided that in case of her death before that of tes-

tator, the property should descend to the Order of Sisters. The sister died before testator; the will was offered and admitted to probate, without contest. Nearly three years thereafter, but while the estate was still in process of administration, the nephew of testator filed a motion in the probate court for an order compelling the executor to distribute the property to him as the heir at law of testator. The court, in ordering the dismissal of the appeal, said: "It is very clear to us that the object sought by Swayne in his application was to set aside the will because of the uncertain description of the beneficiaries and to have the property of the testator turned over to him as heir at law. The argument of counsel for defendant in error in his brief is: 'But Mr. Swayne does not now, and never did, attack the validity of the will; his position is, and always has been, that if the sister of the testator is dead then the property descends to him as heir at law for the reason that the bequest to the Order of Sisters in England is invalid and inoperative.' * * * The application stated that the will was invalid, illegal, inoperative, and void, and the defendant in error sought to have the probate court so declare. If, as said by counsel, the will is valid, then the defendant in error takes nothing. Until its invalidity is declared by a court of competent jurisdiction, he cannot inherit. We are of the opinion that this *was* a proceeding to contest the will, and under the section above quoted the probate court had no jurisdiction to hear or decide this motion. The statute * * * gives the district court exclusive jurisdiction of actions brought to contest wills, and limits the time within which such actions may be brought to two years from the probating of the will."

Having failed to contest the will within the time allowed by law, appellant was foreclosed to thereafter contest its validity, and cannot now be permitted to do by indirection what he could not do directly. It is not necessary that we here determine whether the question could have been raised on objections filed in writing to the settlement of the final account of the executor; objections were not filed, and again the appellant was in default, and now stands in the same position as a defaulting defendant

in a civil action, appealing from a default judgment or decree, and foreclosed from attacking any of the subject matter contained in appealable orders made prior to judgment or decree, and on which appeal was not taken. (2 Cyc. 617.)

This precludes appellant from attacking the validity of the [8] will or the correctness of the decree settling the first annual account of the executor, and the only matters on which we are permitted to pass herein are errors or irregularities appearing on the face of those papers which take the place of a judgment-roll in this proceeding, and of these only such as directly affect the rights of appellant. Applying this rule, we find the objection to the action of the court in confirming the action of the executor in turning the property described over to the trustees, without first obtaining an order of distribution thereof to the trustees. The record, however, discloses that the executor reported his action to the court, and the court did thereafter confirm and approve his action. If error, it was harmless, as all that could thereafter be required would be that the executor procure an order of court before turning the property over and then do exactly as he had done.

Mr. Schouler in his work on Wills, Executors and Administrators, fifth edition, section 1472, says: "In order to carry out special provisions under a will, which look to the preservation of a principal fund for special schemes, such as charity, or so as to pay income only to certain persons designated, until the happening of some event, or so that the fund may accumulate, and generally where the intent is to postpone the full beneficial vesting of the legacy in the ultimate legatee, trustees are usually designated under the will to hold and manage the fund, apart from the executors. These trustees are subject to the approval, direction and sometimes selection of the courts of equity; and properly speaking * * * the administration of these testamentary trusts is a branch, and quite an important one, of equity jurisdiction. * * * In many parts of the United States, however, the probate courts in the several counties have general equity powers, conferred by statute, and exercised concurrently

with the supreme tribunal of the state. The appointment, qualification and immediate supervision of testamentary trustees devolves, however, under American Codes, upon the local probate courts, in the first instance, as in case of executors. * * * The duties of testamentary trustees are distinct from those of executor. * * * Like an executor, the testamentary trustee is required to return an inventory and render his account regularly to the probate court. * * * Subject to the usual variation of state enactments, the general rule in the United States is to place testamentary trustees under a probate supervision similar, *mutatis mutandis*, to that of executors, and from a like sedulous regard for the welfare of the beneficiaries. From the probate decree in such trusts, the usual appeal lies to the supreme tribunal of the state."

In section 609, Schouler, after stating that trustees should qualify and obtain the sanction of the court, states: "The executor transfers the trust fund to the trustees thus officially vested with authority to receive it, crediting himself in his accounts accordingly and closing the accounts when his functions are fully performed; and the trustee, returning his own inventory and regular accounts from time to time, carries on the bookkeeping of the estate, or rather the fund under his own direction, as matter of public record, and under the supervision of the court of probate and of the appellate tribunal which exercises probate and equity jurisdiction, until the trust is completely discharged."

Complaint is made that the estate was not ready to be closed, [9] that the property of the estate had not been distributed, and that the executor should not have been, therefore, discharged. The record shows that all debts, bequests and payments provided for under the will had been paid, and that the only property in the hands of the executor was a worthless note for $1,000. The decree of final distribution disposed of the note.

Other irregularities appear in the proceedings, but do not affect the rights of the appellant, and are therefore not considered. We find no error in the action of the court below, sitting

in probate, of which appellant can complain. The final decree of distribution and discharge is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY and HURLY concur.

MR. JUSTICE COOPER, being absent, takes no part in this decision.

ON MOTION FOR REHEARING.

(Decided March 14, 1920.)

MR. JUSTICE MATTHEWS delivered the opinion of the court.

Appellant has filed a petition for rehearing, urging that the opinion herein is in direct conflict with the rules heretofore established by the court, citing *In re Fleming's Estate*, 38 Mont. 57, 98 Pac. 648, and *In re Hobbins' Estate*, 41 Mont. 39, 108 Pac. 7. We do not so view the matter. Nothing in the opinion is intended to, nor do we believe that it does in any manner, conflict with the rules laid down in the cases cited.

In the *Fleming Estate Case*, this court held that the question of heirship, title or interest in an estate could be raised in either of two proceedings: First, as provided for in sections 7670, 7671 and 7672, Revised Codes; or, second, in a contest upon final distribution of the estate—and that those provisions are exclusive of every other procedure for determining such questions.

The *Hobbins' Estate Case* held that the validity or invalidity of specific bequests or devises may not be determined in a will contest under the statute, the court stating that "the issue indicated may be tried and determined in *appropriate proceedings* instituted after the will is formally admitted to probate."

In the instant case we held, in effect, that where an estate has been fully and finally settled, and the property thereof distributed in its entirety, under the terms of a will, one who has acqui-

esced therein by failing to contest the will or any act of the executor, or to proceed in either of the methods outlined in the statute as construed in the *Fleming Case*, cannot for the first time raise the question of heirship, title or interest, contrary to the will, in this court on an appeal from the decree of final distribution and discharge, and, by pointing out errors of which he was theretofore cognizant, if they exist at all, require a reassembling of the assets of the estate and a redistribution thereof, contrary to the provisions of the will, "whichever view we take of the proceedings"; that is, whether an attack on the validity of the will, or merely upon that portion thereof creating a trust. And we announced the opposite and converse of the rule laid down in the *Hobbins Case*, to-wit: "The question of the validity or invalidity of the provisions of the will complained of should have been raised by *appropriate proceedings* in the district court, *under statutes providing therefor* and where the question could have been heard and determined."

Under similar conditions, the supreme court of California, in the case of *McGavin* v. *Orphans' Asylum Soc.*, 34 Cal. App. 168, 167 Pac. 182 (1917), reached the same conclusion, and closed its opinion with the statement: "It must be remembered that a decree of distribution is a judgment *in rem*, and, although erroneous, is as conclusive against one who fails to appear, having the opportunity so to do, as it is against a party whose fault produced the error"—citing cases.

Appellant attempts in his petition for rehearing, for the first time, to question the sufficiency of the notice of the hearing on the final account. It is the universal rule—and this court has repeatedly held—that the court will not consider grounds not [10] presented upon the original hearing. (*Kaufman* v. *Cooper*, 38 Mont. 16, 98 Pac. 504, 1135; *Forrester* v. *Butte & M. etc. Min. Co.*, 21 Mont. 565, 55 Pac. 229, 353; *Merchants' Bank* v. *Greenhood*, 16 Mont. 460, 41 Pac. 250, 851.)

The motion for a rehearing is denied.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY and HURLY concur.

KNOP, RESPONDENT, *v.* CHICAGO, MILWAUKEE & ST. PAUL RY. CO., APPELLANT.

(No. 4,082.)

(Submitted January 16, 1920. Decided February 16, 1920.)

[187 Pac. 1020.]

Railroads—Fencing—Side-tracks and Spurs—Killing Livestock —Presumption of Negligence—Statutes.

Railroads—Fencing—Side-tracks and Spurs—Liability for Injuring Livestock.

1. *Held*, under section 4308, Revised Codes, that a railroad company is not required to fence its tracks at spurs or sidings, and is liable for injuries to livestock at such places only where its actual negligence is established.

Same—Livestock—Injury or Killing—Prima Facie Case of Negligence.

2. Proof of the injury or killing of livestock on the unfenced portion of a railroad track near a siding or spur establishes a *prima facie* case of negligence on the part of the company, notwithstanding the provisions of section 4308 as above construed.

Same—Presumption of Negligence—Conflict in Evidence—Jury Question.

3. Positive testimony by defendant's employees that the train which killed plaintiff's livestock near an unfenced siding was properly equipped with safety devices and that all reasonable care was exercised to prevent the accident merely created a conflict in the evidence determinable by the jury, and did not overcome the presumption of negligence raised by the fact of the killing.

[On power of legislature to make killing of stock *prima facie* evidence of negligence, see note in 32 L. R. A. (n. s.) 227.]

Appeal from District Court, Powell County; Geo. B. Winston, Judge.

ACTION by Louis G. Knop against the Chicago, Milwaukee & St. Paul Railway Company. From a judgment for plaintiff, and from an order denying motion for new trial, defendant appeals. Reversed and remanded.

Mr. L. W. Jordan, for Appellant, submitted a brief; *Mr. I. R. Blaisdell,* of Counsel, argued the cause orally.

The contention of the plaintiff in the trial of this case was, that the place where the plaintiff's horses were killed should have been fenced by the defendant, and that since it was not fenced, *prima facie* the defendant was negligent and is liable

for the value of the horses. The contention of the defendant was, that the place where the horses were killed was at a siding on defendant's railroad, and that, under section 4308 of the Revised Codes, it was not required to fence, and the only question at issue was whether or not the defendant was negligent in the operation of its train.

The evidence introduced by both the plaintiff and the defendant was, that the horses were killed at a point inside of the siding near Garrison station. Some of the witnesses called it a passing track; some called it a siding. In railroad nomenclature, it means a passing track, the side-tracks where trains can pass each other. It is defined in the case of *City of Philadelphia* v. *River Front R. R. Co.*, 133 Pa. St. 134, 19 Atl. 356, 357, as follows: "The words 'sidings, switches, and turnouts,' in relation to railroads, are, of course, of modern growth, and not only in popular use but in the dictionaries are treated as to some extent interchangeable. Thus, the only definition that Webster gives of siding is the turnout of a railroad (noted as English) and turnout is defined as a short side-track of a railroad which may be occupied by one train while another is passing on a main track; a siding." "A blind siding is a side-track where there is no telegraph station." (*Galveston H. & S. A. Ry. Co.* v. *Brown* (Tex. Civ.), 59 S. W. 930, 932.) The term "switch" is defined as follows: "A switch is but a mechanical contrivance or movable opening to pass cars from one track to another." (8 Words & Phrases, 6842, and cases cited.) Hence from these definitions it will be seen that the siding or passing track at Garrison comes within the meaning of a siding as designated in section 4308, which section excepts from the general fencing law, spurs, sidings, Y's, crossings and turntables, at which points the company is still liable for damages in case of injury caused by the negligence of the company in the operation of its trains. In other words, actionable negligence. The burden rested upon plaintiff to show that the injury occurred at a point where the defendant is required to fence its track. (*Kyser* v. *K. C., St.*

J. & C. B. Ry. Co., 56 Iowa, 207, 9 N. W. 133; *Comstock* v. *Des Moines Valley Ry. Co.*, 32 Iowa, 376.)

In an action against a railroad to recover the value of stock killed by its train, the uncontradictory and unimpeachable testimony of such employees of the defendant company, as are presumed to know the facts, that there was no negligence overcomes the presumption of negligence that the law raises from the fact of the killing. (*Georgia Southern & F. Ry. Co.* v. *Sanders*, 111 Ga. 128, 36 S. E. 458; *Western & A. Ry. Co.* v. *Robinson*, 114 Ga. 159, 39 S. E. 950; *Central of Georgia Ry. Co.* v. *Dich*, 121 Ga. 65, 48 S. E. 683.)

Mr. S. P. Wilson, for Respondent, submitted a brief; *Mr. E. J. Cummins*, of Counsel, argued the cause orally.

Defendant introduced proof pretending to show careful management of the train, but did not pretend to offer any excuses for the want of the fence, except that the point was within siding limits, and the sufficiency of that excuse is hereinafter discussed. Not only our statute but the decisions generally fix the rule to be that where there is no fence or an insufficient fence at the place of injury the animal is presumed to have entered the right of way at that point. (*Eaton* v. *Oregon R. & N. Co.*, 19 Or. 371, 24 Pac. 413; *Terre Haute etc I. R. Co.* v. *Penn*, 90 Ind. 284; *Louisville etc. Ry. Co.* v. *Kious*, 82 Ind. 357; *Indianapolis etc. R. Co.* v. *Lindley*, 75 Ind. 426; *Cox* v. *Atchison etc. R. Co.*, 128 Mo. 362, 31 S. W. 3; *Central R. etc. Co.* v. *Lee*, 96 Ala. 444, 11 South. 424; *Daily* v. *Chicago etc. R. Co.*, 121 Iowa, 254, 96 N. W. 778; *McCoy* v. *California Pac. R. Co.*, 40 Cal. 532, 6 Am. Rep. 623.)

Fencing statutes, as a rule, have been made general in their application and generally have made no exceptions for depot grounds, sidings, *etc.* The courts, however, have interpreted this exception into the statutes. (*Baker* v. *Southern California Ry. Co.*, 114 Cal. 501, 46 Pac. 604, 605, construing section 408, Cal. Civ. Code; 2 Kerr's Civ. Code, p. 480.) It was no doubt in view of this construction of the numerous statutes in the various

states requiring railroad companies to fence their right of way that caused the clause, "Provided that nothing herein shall * * * prevent any person * * * from recovering damages * * * for negligent killing * * * of domestic animals at spurs, Y's, crossings and turntables," to be added to our statute. This provision of the statute is neither expressly, nor by implication, an exception of the duty of the railroad company to fence. The statute simply recognizes an exception arising from a source outside the statute. To learn what the exception is, we must go to the source from which it arises, to-wit, the various court decisions which give rise to the exception. Our own court, under the statute general in its wording, has recognized the above exception. (*Beaudin* v. *Oregon Short Line R. R. Co.*, 31 Mont. 238, 78 Pac. 303.)

It will be seen from the authorities below that the duty to fence applies to all places, except where the greater duty of "public interest," either in giving the public access to the railroad or the care and safety of the lives of the employees, and others, arises. (11 R. C. L., sec. 33; *Pennsylvania Co.* v. *Mitchell*, 124 Ind. 473, 24 N. E. 1065; *Rabidon* v. *Chicago etc. R. Co.*, 115 Mich. 390, 39 L. R. A. 405, 73 N. W. 386; *Pennsylvania Co.* v. *Mitchell, supra; Greeley* v. *St. Paul etc. R. Co.*, 33 Minn. 136, 53 Am. Rep. 16, 22 N. W. 179; *Kobe* v. *Northern Pac. R. Co.*, 36 Minn. 518, 32 N. W. 783; *Mundhenk* v. *Central Iowa R. Co.*, 57 Iowa, 718, 11 N. W. 656; Elliott on Railroads, sec. 1193.)

Where there is any reasonable controversy over the facts in determining whether or not the place in question should be fenced, the same is a matter for the jury to determine under proper instructions. (*Rosenberg* v. *Chicago B. & Q. R. Co.*, 77 Neb. 663, 11 Ann. Cas. 22, note, 110 N. W. 641; *Toledo etc. R. Co.* v. *Franklin*, 159 Ill. 99, 42 N. E. 319; *Snell* v. *Minneapolis etc R. Co.*, 87 Minn. 253, 91 N. W. 1108; *Dinwoodie* v. *Chicago etc. R. Co.*, 70 Wis. 160, 35 N. W. 296; *Grosse* v. *Chicago etc. R. Co.*, 91 Wis. 482, 65 N. W. 185; *McDonough* v. *Milwaukee*

etc. R. Co., 73 Wis. 223, 40 N. W. 806; Elliott on Railroads, sec. 1202.)

MR. JUSTICE HURLY delivered the opinion of the court.

Two of plaintiff's horses were killed upon the track of defendant railway company near Garrison by one of its engines.

Plaintiff brought action and recovered judgment, from which, and an order denying a motion for a new trial, defendant appealed.

It appears that the main line of defendant's railway runs in a generally westerly or northwesterly direction from Garrison. Paralleling the same, commencing at a point near the depot, is a passing or side track, joining the main line at a point some distance west. The accident occurred about 200 to 300 feet east of the switch connecting the two tracks at the west end of the passing track. To the north of defendant's track, at a distance testified by witnesses as between 200 and 300 yards at the point where the accident occurred, is the main line of the Northern Pacific Railway. The two lines later converge, and enter a tunnel used by both railway companies; the tunnel being approximately one mile from the depot of defendant at Garrison. On the south of defendant's track the defendant maintains a fence, and the Northern Pacific Railway Company likewise maintains a fence upon the north side of its track. Each fence extends to a point at or near the tunnel. There is no fence between the two tracks.

Plaintiff's land adjoins the track of the Northern Pacific Railway Company on the north side of its fence; the fence being used by plaintiff as a part of his pasture. There was a gate therein leading to the tracks, but plaintiff testified that the gate was not constructed for his benefit nor used by him. The horses were kept in the pasture referred to and went therefrom, presumably through this gate, though there is no direct testimony as to how they escaped from the pasture.

The engineer testified that he did not discover the horses in time to stop his train before coming in contact, though his en-

gine was properly equipped with safety appliances, and that he did all that was possible without endangering the safety of passengers to bring the train to a stop, to avoid injuring the animals.

The plaintiff predicates his right to recover upon the failure of the defendant to maintain a proper fence upon the north side of its track between its station at Garrison and the tunnel, also alleging negligence in the operation of the train which killed the [1] animals. Defendant's answer is in effect a general denial. The contention of the company was that, the stock being killed at a siding, under the law it was not obliged to fence at such point.

An examination of our statutes dealing with the subject of animals injured by reason of the failure to fence discloses that various laws upon the subject have been enacted by different legislatures.

The history of section 950, Civil Code of 1895, is discussed by Mr. Commissioner Clayberg in *Beaudin* v. *Oregon Short Line R. R. Co.*, 31 Mont. 238, 78 Pac. 303. That section was later amended by Chapter 29, Laws of 1905, page 60, thereof, which in turn was amended by an Act of the legislature approved March 1, 1907, embodied in our present statute as section 4308, Revised Codes of 1907, which reads as follows: "Railroad corporations must make and maintain a good and legal fence on both sides of their track and property, and maintain, at all crossings, cattle-guards over which cattle or other domestic animals cannot pass. In case they do not make and maintain such fence and guards, if their engines or cars shall kill or maim any cattle or other domestic animals upon their line of road, they must pay to the owner of such cattle or other domestic animals, in all cases, a fair market price for same, unless it occurred through the neglect or fault of the owner of the animal so killed or maimed: Provided, that nothing herein shall be construed so as to prevent any person, or persons, from recovering damages from any railroad corporation for its negligent killing or injury to any cattle, or other domestic animals, at spurs, sidings, Y's, crossings and turntables."

The only difference between the present statute and Chapter 29, Laws of 1905, is the addition to the latter Act of the clause commencing with the words "*provided*" therein.

Section 950, Civil Code of 1895, restricted the liability of the railways for injuries based upon a mere failure to fence to accidents occurring upon the railway along or through the realty of the owners of the cattle injured, and contained other provisions not embraced in the present statute, but which are not germane to the questions involved in this case. In all of these sections, however, is found the general provision: "Railroad corporations must maintain a good and sufficient fence on either or both sides of their track and property." In none of them is contained a provision in express words relieving the railway company from the obligation of fencing all portions of their rights of way, including depot grounds, sidings, spurs, *etc.*

Provisions of similar statutes, however, have been frequently construed, and the rule is stated in Elliott on Railroads, sections 1193 and 1194 (citing cases), in accord with the weight of authority and which we regard as founded upon sound reasoning, as follows: "Although a statute imposing the duty to fence may not in express terms except highways, the court, from the necessities of the case, will give the statute such a construction as to exempt the company from the duty to fence at a public crossing.

"Railroad companies are not required to fence their tracks at their depots and about their station grounds. Where passengers and freight are received and discharged the public convenience requires that there should be unobstructed access to the buildings and tracks, and therefore fences are not required.

"The exemption applies to passenger stations, freight depots, and the space used for the convenience of the company in switching its cars and making up trains and supplying its engines with fuel and water. The exemption of switch grounds is founded on the danger to employees which would necessarily result were the tracks fenced. The safety of the employees at points where they almost continuously pass up and down the track in the per-

formance of their duties is far more important than would be the safety afforded to animals and property from the erection of fences at such tracks." (See, also, *Baker* v. *Southern California Ry. Co.*, 114 Cal. 501, 46 Pac. 604, 605; *Prickett* v. *Atchison, T. & S. F. R. Co.*, 33 Kan. 748, 7 Pac. 611; *Atchison, T. & S. F. R. Co.* v. *Shaft*, 33 Kan 521, 6 Pac. 908; *Wilmot* v. *Oregon Ry. Co.*, 48 Or. 494, 120 Am. St. Rep. 840, 11 Ann. Cas. 18, 7 L. R. A. (n. s.) 202, 87 Pac. 528; 11 R. C. L., sec. 33 (Fences).)

In fact, this court, in the case of *Beaudin* v. *Oregon Short Line R. Co., supra,* while not so stating explicitly, recognized the rule as above set forth, in basing its decision therein upon similar authorities there cited.

Respondent insists that, as to whether a certain point on the railway is or is not one which by reason of its location the railroad is required to fence, the rule is as stated in Elliott on Railroads, sections 1194 and 1202 (citing cases):

"It is held that the question as to whether the place at which an animal is killed or injured is reasonably necessary for depot purposes may be for the jury, but where only one conclusion can be drawn it is a question for the court.

"While it is purely a question of law whether or not a railway company shall fence at its depot grounds or at points where the erection of a fence would interfere with the company in transacting its business, it is usually a question of fact whether a certain point constitutes part of the depot grounds or whether the erection of a fence at any particular place would interfere with the company's employees in the performance of their duties. Thus it has been held for the jury to determine whether a company is excused from putting in cattle-guards at a particular point, on the ground that their erection would interfere with the employees of the company in the performance of their duties."

Such views would be of great weight had either of the statutes in force preceding the enactment of section 4308 remained a part of the statute law of this state. However, as indicated, the legislature, in enacting what is now section 4308, added to the then existing law the following clause: "Provided, that nothing herein

shall * * * prevent any person * * * from recovering damages * * * for its negligent killing * * * domestic animals at spurs, sidings, Y's, crossings and turntables'' —thereby saying to the railway companies that in the event of their failure to fence their tracks they would be liable for all injuries resulting to stock by reason of such failure, without a showing of negligence, and that as to the designated places the companies would be held liable for injuries to stock only where its actual negligence was established. As, in the cases where the injuries are the result of a failure to fence, other negligence need not be proven, while in the latter case a stock owner must prove negligence, it is reasonable to assume that the legislature, recognizing the interest of the public in having free access to station grounds for the transaction of business with the companies, and the danger resulting to employees operating trains from the construction of necessary cattle-guards across the tracks connecting fences contiguous to sidings, spurs, *etc.*, in effect said that no fence should be required at such places.

Appellant contends that in the latter event the provisions of [2, 3] section 4309 that the killing or injury shall be *prima facie* evidence of negligence on the part of the company do not apply; also that where, as in this case, the railway employees testify positively that the train was properly equipped with safety devices, and that all reasonable care was used to prevent injury, even in cases where that section is applicable, the *prima facie* case has been rebutted. In neither of these views do we concur. Section 4309 makes no exception in favor of railway companies as to accidents occurring at the places enumerated in section 4308. The owner suing for damages resulting from injuries to his stock at those points is as much entitled to establish his *prima facie* case under the provisions of the latter section as in any other instance. The other contention has been set at rest by decisions of this court that such testimony on the part of the company merely creates a conflict in the testimony, to be determined by the jury. (Rev. Codes, sec. 8028, subd. 2; *Johnson* v. *Chicago, M. & St. P. Ry. Co.*, 52 Mont. 73, 155 Pac. 971; *Free-*

man v. *Chicago, M. & St. P. Ry. Co.*, 52 Mont. 1, 154 Pac. 912; *Emerson* v. *Butte Elec. Ry. Co.*, 46 Mont. 454, 129 Pac. 319; *State* v. *Nielsen, ante*, p. 137, 187 Pac. 639.)

The court submitted to the jury the question whether the defendant was guilty of negligence in the failure to maintain a fence, and also submitted an instruction in effect leaving to their determination whether or not the erection of a fence would interfere with the convenience of the public or the safety of employees of the railway company, in either of which events the jury were told the company was not required to fence the siding.

In our view the sole question to be submitted to the jury, upon the record, aside from that of damages, was as to whether or not the accident was occasioned by the negligent operation of defendant's train.

It follows that the motion for a new trial should have been granted. The judgment and order appealed from are reversed and the cause remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, MATTHEWS and COOPER concur.

IN RE CALLICOTTE.

(No. 4,354.)

(Decided February 19, 1920.)

[187 Pac. 1019.]

Attorneys—Disbarment—Sale of Intoxicating Liquor—Conviction.

1. C., an attorney and counselor at law, was charged with conducting a place where intoxicating liquors were sold in violation of law; he pleaded guilty and was sentenced to pay a fine. Charged with conduct justifying his disbarment, he made neither appearance nor answer. *Held*, upon the record of his conviction that he was unfit to be a member of the bar, and his name ordered stricken from the rolls.

PROCEEDINGS for the disbarment of J. W. Callicotte from the practice of law. Disbarment ordered.

Mr. S. C. Ford, Attorney General, for the State.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On January 24, 1919, there was filed in this court by the attorney general a complaint, properly verified, charging J. W. Callicotte, an attorney and counselor at law of the courts of Montana, [1] with conduct justifying his disbarment from the practice of law, as follows: "That on or about the twenty-fourth day of August, 1918, and for some time prior thereto, and continuously thereafter, up to the twenty-fourth day of September, 1918, at the town of Bowdoin, in Phillips county, the said J. W. Callicotte, being then and there a member of the bar of this court, maintained a common nuisance in violation of the laws of the state of Montana, in that the said J. W. Callicotte then and there conducted a place where intoxicating liquors were sold, bartered, and given away in violation of law, and where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage in violation of law."

It is further alleged that in an action before Isaac N. Rader, justice of the peace of Malta township, Phillips county, charging Callicotte with maintaining the nuisance, Callicotte pleaded guilty and was punished by being sentenced to pay a fine.

Though served with summons and a copy of the complaint on May 29, 1919, Mr. Callicotte has never made an appearance in this court nor made any answer denying the charge. He therefore stands in default for failure to answer.

At the time the complaint was filed the attorney general submitted the record of Callicotte's conviction as above set forth. This is sufficient to establish the charge against him. Therefore, without comment further than to say that an attorney who is so far unmindful of the obligations of his oath as to be guilty of such conduct is unfit to be a member of the bar, it is ordered and

adjudged that the said J. W. Callicotte be removed from his office as attorney and counselor at law, and that his name be stricken from the rolls.

ASSOCIATE JUSTICES HOLLOWAY, HURLY and MATTHEWS concur.

MR. JUSTICE COOPER, being absent, takes no part in the foregoing decision.

JACOBSON ET AL., APPELLANTS, v. ROMAN ET AL., RESPONDENTS.

(No. 4,079.)

(Submitted January 15, 1920. Decided February 19, 1920.)

[188 Pac. 138.]

Lost Instruments—Deeds—Re-execution—Equity—Jurisdiction.

Deeds—Loss or Destruction—Re-execution—Equity.

1. Where a deed, after execution and delivery, has been lost or destroyed before recordation, or where the grantor has fraudulently gained possession of and destroyed it, and the title of the grantee is thus affected, a court of equity may decree a re-execution of it.

Same—Recordation—Property Right.

2. The right of the owner of real property to have his evidence of title appear properly upon the record is a substantial property right recognized by the law.

Same—Re-execution—At Whose Expense.

3. In the case of loss or destruction of a deed before recordation without the fault of the grantor, restoration should not be had at his expense, unless, upon demand, accompanied by the presentation to him of a new deed ready to be executed by him, he refuses to execute and acknowledge it; where, however, he fraudulently gains possession of and destroys it, the wrong is remediable at his expense.

Same—Re-execution—Conveyance Prerequisite—Jurisdiction.

4. Jurisdiction to decree re-execution of a lost or destroyed deed presupposes a conveyance; hence where a deed alleged to have been fraudulently obtained and destroyed by the grantor had never been accepted by the grantee, there was no delivery, and therefore no conveyance, and judgment denying the relief prayed for was proper.

Specific Performance—Purpose of Action.

5. The purpose of an action for specific performance is to have defendant execute a conveyance of the title which he refuses to convey.

Appeal from District Court, Sheridan County; F. N. Utter, Judge.

ACTION by E. I. Jacobson and Julia Keats against Hiram J. Roman, Mabel Roman, his wife, and Aime Catellier. From a judgment in favor of the first-named defendant and one in favor of the last two, the plaintiffs appeal. Affirmed.

Cause submitted on brief of Counsel for Appellants.

Mr. C. E. Comer, for Appellants.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Plaintiffs brought this action to obtain a decree requiring the defendants to deliver to them a warranty deed to certain land situated in Sheridan county, or, if delivery cannot be had because of the mutilation or destruction of the deed, then for a decree requiring the defendants to execute another deed and deliver it to the plaintiffs. The complaint is very long. The following brief summary of it will be sufficient for present purposes: That on June 11, 1915, the defendant Hiram J. Roman was the owner in fee of the land, which is of the value of $2,000; that the record title thereto was in his name; that defendant Mabel Roman was his wife, but was not then and never had been in the state of Montana; that the defendant Hiram J. Roman sold and conveyed the land to plaintiffs by warranty deed, duly acknowledged for record; that the deed was then delivered to the plaintiffs; that plaintiffs thereupon took possession of the land and have held possession thereof until the present time, expending large sums of money to improve it; that the consideration for the sale and transfer to plaintiffs was the sale and transfer by plaintiffs to the defendants of certain personal property which was then delivered to defendants, they assuming and agreeing to pay an encumbrance thereon, the amount of which, $312, was specified in the bill of sale then executed and delivered to them by the plaintiffs; that thereafter, on or about June

11, 1915, the defendants fraudulently secured possession of the deed, and have since detained it from the plaintiffs, though plaintiffs have at various times demanded possession of it.

Upon the service of summons the defendants interposed a general demurrer to the complaint, which was overruled. Default was entered against defendants Mabel Roman and Aime Catellier for failure to answer within the time allowed for that purpose. Defendant Hiram J. Roman answered, denying all the material allegations of the complaint, and alleging new matter as a defense, upon which the plaintiffs joined issue by reply. At the time appointed for trial plaintiffs submitted evidence to make their case against the defaulting defendants, and moved for judgment. Thereupon, having called a jury, the court proceeded to try the issues made up by the pleadings between plaintiffs and the defendant Hiram J. Roman. During the trial there was some controversy between opposing counsel as to whether the action is one at law in claim and delivery, or one in equity. The presiding judge was at first inclined to regard it as one in claim and delivery and to submit the issues to the jury accordingly. At the close of plaintiff's evidence, however, counsel for defendants made a formal motion for a dismissal of the action on the ground that the evidence was not sufficient to warrant any relief. After some discussion it was agreed by counsel that the case should be submitted to the court as one in equity, for final decision on the merits on the evidence introduced by plaintiffs. The jury was thereupon discharged. Thereafter the court found generally for defendant Hiram J. Roman and rendered judgment dismissing the action as to him, with costs. A few days later it also rendered judgment denying relief as against the other defendants. Plaintiffs have appealed from both judgments.

Counsel for defendants have not filed a brief in this court. We are therefore left to determine the case as best we may without any assistance from them. As we view it, however, no question is presented to us which we regard worthy of consideration,

other than the inquiry whether the trial court reached the correct conclusion.

Prior to June 9, 1915, the plaintiff Jacobson had owned and been conducting a pool-hall in a leased building in Medicine Lake, Sheridan county. On that day he entered into negotiations with Hiram J. Roman to sell to him the business. It was finally agreed that Roman would take over the business in consideration of a conveyance by him to Jacobson of the land and the payment of $500 in cash. Jacobson was to make to him a bill of sale of the fixtures in the pool-hall and a small amount of cigars, candy and other articles of merchandise. The building, fixtures, *etc.*, were then delivered to Roman, and he assumed possession and continued the business. On June 11 the two, in company with Catellier, met at the State Bank in Medicine Lake to execute and make mutual delivery of the necessary writings. Mr. Gregg, the assistant cashier of the bank, acted as scrivener and notary public. A bill of sale of the fixtures, *etc.*, was executed by Jacobson and delivered to Roman. Roman did not have the money to make the cash payment. It was then agreed that he and defendant Catellier would execute their joint promissory note to Jacobson for $488, due in thirty days, secured by a mortgage on land owned by Roman in Montrail county, N. D. Gregg drew the mortgage, taking the acknowledgment of Roman and Catellier, who also signed it, certifying it for record. It, with the note, was delivered to Jacobson. The consideration for the note was made $488 instead of $500, the amount agreed to be paid in cash because it was found upon investigation that the fixtures were encumbered for $12 more than was supposed at the time the negotiations were begun. Gregg then drew the deed, naming the defendants Roman and wife as grantors and the plaintiff Julia Keats, the mother of Jacobson, the grantee. The bill of sale contained a warranty that the fixtures, *etc.*, conveyed by it were free from encumbrance other than the sum of $312 due Koehler & Hinrichs, of St. Paul, Minnesota. According to the testimony of Gregg, Roman signed and acknowledged the execution of the deed, but the certificate of acknowledgment

was left imperfect in that Gregg omitted to authenticate it by attaching his seal, the recital of the place of his residence, and the date of the expiration of his commission, as required by the statute. While it was in this condition, the question arose whether it was a sufficient conveyance unless it should be signed and acknowledged by Mabel Roman also. After some discussion and after both Jacobson and Roman had examined the deed, it was determined that the signature of the wife was necessary. Gregg was requested by Jacobson to forward it to Mrs. Roman, who was residing at Moose Jaw, Canada, for her signature and acknowledgment. Some doubt having then arisen whether she would act upon Gregg's request, it was finally agreed that Roman would forward it, and upon its return by her would deliver it. Roman did forward it. She signed it, but whether she made proper acknowledgment of it the evidence does not disclose. Within a few days she came in person to Medicine Lake, bringing the deed and delivering it to her husband. In the meantime Roman had ascertained that there were encumbrances upon the fixtures, *etc.*, in the form of a mortgage of $125 to secure a debt due to one Wigmore, who resided in Medicine Lake, and for other amounts in the form of purchase-money liens in favor of the dealers from whom Jacobson had purchased them. Upon the discovery of these encumbrances, Roman offered to rescind the sale and return to Jacobson the fixtures, *etc.*, provided he would cancel the mortgage on the Dakota land and surrender the note. Jacobson refused to rescind the sale. Thereafter Roman, upon receiving the deed, blotted out the signature of himself and wife and retained possession of it. Later he gave Jacobson formal written notice that he had elected to rescind the contract, and that he would return the fixtures, *etc.*, upon the cancellation of the note and mortgage. Roman did not deliver possession of the land to plaintiffs, nor did they undertake to assume possession of it.

Counsel contends that, since by section 3713 of the Revised Codes it is expressly provided that a man residing in Montana whose wife has never been in the state may by deed grant full

title to any real estate owned by him in the state by his own signature, the signature of Mabel Roman, the wife, was not necessary to cut off her dower right, and hence that, by reason of the fact that Jacobson had the deed in his hands, there was a delivery to and acceptance of it by him sufficient to enable him to assert title to it and to maintain this action. It is well settled [1] that, when a deed has once been executed and delivered, but has been lost or destroyed before it is properly recorded, and the title of the grantee is thus affected, a court of equity [2, 3] has jurisdiction to decree a restoration of it. The right of the owner of real estate to have his evidence of title appear properly upon the record is a substantial property right which the law recognizes; and a court of equity will entertain an action by him against his grantor to establish the lost deed when such relief is necessary to protect his rights in this behalf, and this whether the loss occurred while the deed was in the possession of the grantee or not. For a stronger reason will relief be granted if the grantor has fraudulently gained possession of the deed and destroyed it. In the former case the restoration should not be made at the expense of the grantor, unless, upon demand accompanied by the presentation to him of a new deed ready to be executed by him, he refuses to execute and acknowledge it. In the latter case the grantor has by his wrongful act directly invaded the substantial rights of the grantee, which is remediable at his expense, as any other wrong. (17 R. C. L. 1170.)

From among the great number of authorities cited by counsel we insert the following: Pomeroy's Spec. Perf. Contracts, sec. 13; 25 Cyc. 1611; 2 Story's Eq. Jur., sec. 125; *Hoddy* v. *Hoard,* 2 Ind. 474, 54 Am. Dec. 456; *Griffin* v. *Fries,* 23 Fla. 173, 11 Am. St. Rep. 351, 2 South. 266; *Hord* v. *Baugh,* 7 Humph. (Tenn.) 576, 46 Am. Dec. 91; *Hudspeth* v. *Thomason,* 46 Ala. 470; *Mason* v. *Black,* 87 Mo. 329; *Bennett* v. *Waller,* 23 Ill. 97; *Cummings* v. *Coe,* 10 Cal. 529; *Conlin* v. *Ryan,* 47 Cal. 71; *Boyes* v. *Ramsden,* 34 Or. 253, 55 Pac. 538; *Cartright* v. *Cartright,* 70 W. Va. 507, Ann. Cas. 1914A, 578, 74 S. E. 655; *Kent* v. *Church of St. Michael,* 136 N. Y. 10, 32 Am. St. Rep. 693, 18 L. R. A.

331, 32 N. E. 704; *Mullins* v. *McCoy*, 170 Ky. 547, 186 S. W. 137; *Little* v. *Stringfellow*, 46 Utah, 576, 151 Pac. 347.

The facts recited above are not controverted. They do not, [4] from any point of view, make a case warranting the relief sought by plaintiffs. There was no delivery of the deed, because the negotiations broke down before they were completed and the deed executed and ready for delivery. Jacobson and Roman were both ignorant of the provisions of the statute. Both were of the opinion that the deed must be signed by the wife in order to convey a perfect title, and for this reason Jacobson did not accept it. If, in his ignorance of the law, he deemed the deed insufficient, the fact that he proceeded upon a misconception can make no difference. The fact remains that he did not accept it, and therefore that there was no delivery. Legal title to the land did not pass; neither did title to the deed itself. The jurisdiction invoked by plaintiffs presupposes that a conveyance already made has been lost or destroyed. We do not mean to intimate that the plaintiff Keats is not entitled, by an action for specific performance, to have the conveyance made to her. The complaint alleges that the conveyance was made, but destroyed; [5] whereas the purpose of an action for a specific performance is to have the defendant execute a conveyance of the title which he refuses to convey.

The district court therefore reached the correct conclusion that plaintiffs were not entitled to any relief in this action as against Roman.

In the foregoing discussion we have treated Jacobson as an interested plaintiff. The purpose of the parties was to have the deed executed to the plaintiff Keats and delivered to Jacobson for her. If this was the arrangement, Keats was the only interested party, and Jacobson, her agent, was improperly joined as plaintiff.

The court also properly denied the plaintiffs relief as against Mabel Roman and Catellier. The evidence introduced to make a case against them was substantially the same as that introduced at the trial of the issues between the plaintiffs and Roman.

It discloses that the only connection Mabel Roman had with the transaction was that she was the wife of Hiram J. Roman. She did not agree to convey; neither did she have anything to do with the mutilation or destruction of the deed. Catellier had no interest in the land, nor was he interested in the transaction in any way, other than as an accommodation to Roman to become personally liable with him to Jacobson on the note and mortgage executed to Jacobson to secure a part of the purchase money for the fixtures in the pool-hall.

Both judgments are therefore affirmed.

Affirmed.

ASSOCIATE JUSTICES HOLLOWAY, HURLY and MATTHEWS concur.

MR. JUSTICE COOPER, being absent, takes no part in the foregoing decision.

DALY, RESPONDENT, *v.* KELLEY, APPELLANT.

(No. 4,106.)

(Submitted January 17, 1920. Decided February 19, 1920.)

[187 Pac. 1022.]

Sheriffs—Attachment—Caretaker — Unauthorized Appointment —Compensation—Liability — Deputies—Powers — Excessive Verdicts.

Sheriffs — Attachment—Caretaker—Unauthorized Appointment—Compensation—Personal Liability.

1. A sheriff who fails to secure an order authorizing the appointment of a keeper before appointing him may be held personally liable for his compensation, the keeper being under no obligation to first ascertain whether such an order has been secured.

Same—Caretaker—Appointment by Deputy—Liability for Compensation.

2. The fact that the appointment of the keeper of attached property referred to in paragraph 1, *supra*, was made by defendant sheriff's deputy did not relieve defendant of liability for the keeper's compensation, in view of section 350, Revised Codes, defining the powers of deputies, and the maxim "*qui facit per alium facit per se.*"

Work and Labor—*Quantum Meruit*—Proof of Express Contract—Variance.

3. One suing on *quantum meruit* for the value of services rendered may testify to an express promise to pay a specified amount; the only effect in such a case of proof of an express contract fixing the price, being that the stipulated price becomes the *quantum meruit* in the case; hence the testimony is not objectionable on the ground of variance.

Same—Value of Services—Testimony of Unqualified Nonexpert Witness—Effect.

4. Where plaintiff in an action on *quantum meruit*, after testifying to an express agreement fixing his compensation, stated that the sum agreed upon was the reasonable value for the services rendered, the fact that he did so without first technically qualifying as an expert witness was inconsequential.

Sheriffs—Deputies—Appointment of Caretaker—Proper Cross-examination.

5. Since defendant sheriff's deputy had the authority to appoint a caretaker for attached property as an incident to his duty to attach and safely keep it, a question on cross-examination whether this was the first caretaker he had ever appointed was not improper.

Same—Caretaker—Compensation.

6. The fact that plaintiff, while acting as keeper of attached mining property, was at the same or part of the time acting in a different capacity for the receiver, did not preclude him from recovering the reasonable value of his services as keeper under appointment by defendant.

Same—What not Excessive Verdict.

7. A verdict of $800 for services as keeper of attached mining property for a period of 400 days, part of which time plaintiff was employed by the receiver as superintendent, *held* not excessive.

Appeal from District Court, Missoula County; Asa L. Duncan, Judge.

ACTION by Jesse Daly against W. L. Kelley. From a judgment for plaintiff and an order denying him a new trial, defendant appeals. Affirmed.

Cause submitted on briefs of Counsel.

Mr. Henry C. Stiff and *Mr. Thomas N. Marlowe*, for Appellant.

Mr. Harry H. Parsons, for Respondent.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

As appears from the record, appellant, Kelley, was sheriff of Missoula county, and one W. B Coffey was his deputy in charge

of the office. On January 15, 1914, a writ of attachment was placed in Coffey's hands and by him served by taking into his possession, as deputy sheriff, a considerable amount of personal property, and he thereupon posted on the property of the mining company, defendant, a notice of attachment, signed: "W. L. Kelley, sheriff. W. B. Coffey, Deputy Sheriff"—to which he added: "I have this day appointed Jess Daly as caretaker of the above-attached property." No order of court was secured authorizing the appointment of a keeper or caretaker for the property. On April 7, 1914, the district court of Missoula county appointed a receiver for the property of the mining company and placed him in charge, who, as he testified, "took charge of the property subject to all encumbrances and attachments." He did not "attempt to supersede Mr. Daly's authority there as caretaker," but appointed him also superintendent under the receivership. No revocation of Daly's appointment as keeper was made, and he remained in charge for something over 400 days. The appellant having refused to pay respondent for his services, suit was brought for the "reasonable value" thereof, alleged to be $3 per day.

At the close of respondent's case, appellant moved for a judgment of nonsuit, which motion was overruled. Testimony on behalf of appellant was introduced, and the trial resulted in a verdict for $800, and judgment was entered accordingly. Appellant moved for a new trial, which motion was denied. This appeal is from the judgment and from the order denying a new trial.

1. Appellant's first specification is that the court erred in not sustaining his objection to the introduction of any testimony, on [1] the ground that the suit was brought against Kelley as an individual for an act claimed to have been done by him in his official capacity, and that it nowhere appears in the complaint that an order was made by the court authorizing the appointment of a keeper or caretaker.

Section 3167, Revised Codes, under the head of "Fees of Sheriff," provides: "For the expense in taking and keeping pos-

session of and preserving property under attachment, execution, or other process, such sum as the court or judge may order, not to exceed the actual expenses incurred, and no keeper must receive to exceed three dollars per day, and no keeper must be employed without an order of court, nor must he be so employed unless the property is of such character as to need the personal attention and supervision of a keeper. No property must be placed in charge of a keeper if it can be safely and securely stored, or where there is no reasonable danger of loss."

A writ of attachment runs to the sheriff of the county in which the property of the defendant in the attachment suit is situated, and requires him to "attach and safely keep" the same or so much thereof as shall be necessary. (Rev. Codes, sec 6660.) If, in making the levy, the sheriff concludes that the property attached is of such a nature or is so situated as to require the services of a keeper, it is the duty of the sheriff to secure the necessary order, either directly or through counsel for the attaching creditor, in order that the keeper's fees may be properly included as taxable costs in the case. However, the failure of the sheriff to secure such an order will not relieve him from personal liability where he has in fact made his appointment.

The appointee is under no obligation to determine as to whether such an order has been secured. (*Foster* v. *Rhinehart* (City Ct.), 11 N. Y. Supp. 629.) It is presumed "that official duty has been regularly performed." (Sec. 7962, subd. 15, Rev. Codes.) Having performed services for the sheriff, under an appointment, the keeper looks to the sheriff for compensation, whether it comes from the sheriff directly or indirectly, and, if it transpires that the sheriff has neglected to secure an order which will entitle him to charge the expense as taxable costs in the attachment suit, the sheriff cannot evade responsibility by pleading his own dereliction, or that of his deputy. It is a maxim of jurisprudence that, "where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened must be the sufferer." (Rev. Codes, sec. 6211.)

It follows, therefore, that if through negligence of his office it is out of the power of the sheriff to recoup his loss in taxable costs, the sheriff, and not the keeper, should be the loser. His appointment of Daly, if it was his appointment, was valid as between himself and Daly, even though he did not comply with the law in first securing an order of court.

2. But it is contended that the sheriff cannot be held liable, [2] as the appointment was not made by the sheriff, but by his deputy, Coffey.

The case of *Chenowith* v. *Cameron,* 4 Idaho, 515, 42 Pac. 503, is on all-fours with this, and there the court said: "Plaintiff was put in as keeper by one Hardesty, a deputy, * * * at an agreed compensation of $3 per day, and so remained in possession and charge * * * as keeper [14 months]. * * * During all this time the defendant was sheriff of said county, and must of necessity have known of the whole transaction between his deputy and the plaintiff. To presume otherwise would be to impeach both the integrity and capacity of the sheriff. * * * It is now claimed by defendant that, as plaintiff was employed by his deputy, he [defendant] is not liable for his fees. What was this sheriff doing during the fourteen months that plaintiff was acting as keeper of said property? Is it possible the sheriff of Shoshone county would hold property of this magnitude and value under attachment for a period of fourteen months without knowing who was the keeper, or what his compensation was to be? * * * *'Qui facit per alium facit per se'* is a maxim peculiarly applicable to cases of this kind. Again, the acquiescence for a period of fourteen months by the sheriff in the service of plaintiff was a palpable ratification of the act of his deputy in employing plaintiff." The court closes the opinion with a statement that an examination of the authorities is hardly necessary, as "the universally recognized rules of common honesty are sufficient for the decision of this case."

In *Foster* v. *Rhinehart, supra,* the court said: "Now, if the deputy, in the discharge of his duty, deems it wise to employ keepers to aid him to 'safely keep' the attached property, he is,

in our opinion, acting within the scope of his employment, and the sheriff is liable for his acts. * * * The sheriff, through his deputy, employed plaintiff's assignor, and he had a right to look to the sheriff for compensation for his time and services. * * * He was justified in assuming that the sheriff, through his deputy, could properly employ him."

The supreme court of Nevada, in *Allen* v. *Ingalls*, 33 Nev. 281, Ann. Cas. 1913E, 755, 111 Pac. 36, 114 Pac. 758, followed the case of *Chenowith* v. *Cameron*, cited.

Section 350, Revised Codes, provides that "in all cases not otherwise provided for, each deputy possesses the powers and may perform the duties attached by law to the office of his principal."

It is true that in the single case cited by appellant (*Krum* v. *King*, 12 Cal. 412) it was held that a deputy sheriff who seizes property under an attachment is not authorized, by virtue of his office, to bind the sheriff by contract for the payment of keepers' fees. The opinion was written in 1859, and, after a short statement of the facts, consumes about five lines of the report and cites no authorities. It is supported neither by the weight of authority nor by those "universally recognized rules of common honesty" referred to by the supreme court of Idaho, and we find no case in which the rule there laid down is followed.

So much for the first five assignments of error, all of which refer to the questions above discussed.

3. The sixth and seventh assignments pertain to the admission of evidence as to the value of the services.

Respondent sued on *quantum meruit*. He testified to a [3] promise by the deputy that he would be paid $3 per day, and also that $3 per day was the reasonable value of the services performed. Appellant contends that this was at variance between the allegations and the proof. This position is untenable. "Where there is a special agreement, and the plaintiff has performed on his part, the law raises a duty on the part of the defendant to pay the price agreed upon, and the plaintiff may count either on the implied *assumpsit* or on the express agree-

ment. The only effect in such a case of proof of an express contract fixing the price is that the stipulated price becomes the *quantum meruit* in the case. It is not a question of variance but only of the mode of proof of the allegations of the pleading." (9 Cyc. 685, 686.) "At most, it is but a variance between the pleading and the proof which may be disregarded unless it appears that the defendant was misled by it." (9 Cyc. 749.)

Having testified to an express contract fixing the compensation [4] at $3 per day, which then became the *quantum meruit* in the case, the fact that respondent was thereafter permitted to testify that such sum was the reasonable value of the services, without being first technically qualified as an expert witness, was inconsequential.

4. The tenth assignment, next taken up for argument, is that [5] it was error, highly prejudicial to appellant, to permit the question on cross-examination of the deputy sheriff, "Was this the first caretaker you ever appointed?" on the ground that "the jury no doubt obtained the idea that the witness had the right and authority to appoint a caretaker as a matter of course." Having determined that the witness had that authority as an incident to his duty to "attach and safely keep" the property, the question was proper on cross-examination.

5. Error is assigned on the giving of certain instructions drawn in conformity with the theory of the sheriff's liability for the act of his deputy. As his liability is uncontrovertible, we find no error in instructions 1, 2 and 4.

6. Instruction No. 3 reads as follows: "The jury are instructed [6] that, even if you believe from a preponderance of the evidence that the plaintiff was in the employ of the owner, trustee, or receiver of the attached property during a part or all of the time he was in charge of such property as keeper, such employment does not preclude his right to recover from the defendant the reasonable value of his services to the defendant as keeper, not exceeding $3 per day."

It is contended that this instruction conflicts with instruction No. 2, which advised the jury that, if they found that the re-

spondent was employed as alleged, "the sheriff under such circumstances is liable to pay the keeper a reasonable compensation from the time of his appointment to the time when he surrendered possession of the attached property." This instruction correctly stated the law; but it is asserted by appellant that "the undisputed and admitted facts in this case was [were] that the same court in which this action was tried, and in which the attachment case was pending, appointed L. A. Ramage receiver of this property on April 7, 1914," and "from this testimony we find that Ramage, as an officer of the court, took immediate charge of all the property which had been attached, and appointed plaintiff as his superintendent" They further insist that "certainly Ramage could not have been in possession as receiver and plaintiff as caretaker of an attaching creditor."

The argument would be more appropriate and efficacious to a jury on the question of the amount to be awarded plaintiff than on an objection to the instruction. Under the instructions given, a jury might have found that respondent surrendered possession of the property on April 7, 1914, and was therefore entitled to compensation only from January 15 to April 7, had the jurors been of the opinion that the facts warranted such a finding.

While appellant does not formally assert that the verdict is excessive, he contends that, as the labor performed was not [7] onerous, the sum of $100 would have been ample, and that the judgment should be reduced to that amount.

While it is true that Ramage testified, "When I was appointed, under the order of the court, I took charge of all of the property of the Iron Mountain Tunnel Company," and "this property which is enumerated in plaintiff's exhibit 1 is a part of the property I took charge of as receiver," and "as receiver I appointed Mr. Daly as superintendent," on cross-examination he stated: "I took charge of the property subject to all attachments and encumbrances. I consulted counsel and found what my rights and his rights to the property were. I did not attempt to supersede Mr. Daly's authority there as caretaker."

It appears from the evidence that there was property held under writs of attachment other than that under which Daly was appointed. Horses belonging to the company were so held; while a part of the property placed in Daly's keeping consisted of hay and feed—fact conditions certainly calling for the continuance of a keeper in charge of the property which was to be conserved. This fact must have been apparent to the sheriff; for the appointment of Daly as keeper was not revoked after he was appointed superintendent of the mine in its active operation.

The jury had the advantage of seeing the witnesses on the stand in order to determine as to their credibility, as did the court, in passing upon the motion for a new trial; and evidently the jury took into consideration, in determining the amount to which respondent was entitled, the fact of his dual employment, for, although the only evidence on the subject fixed his reasonable compensation at $3 per day, the jury apparently allowed him something under $2 per day.

We find no substantial error in the record. The judgment and order denying a new trial are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY and HURLY concur.

MR. JUSTICE COOPER, being absent, takes no part in the foregoing decision.

STATE EX REL. JUCKEM, RELATOR, v. DISTRICT COURT ET AL., RESPONDENTS.

(No. 4,538.)

(Submitted January 19, 1920. Decided February 19, 1920.)

[188 Pac. 137.]

Mandamus—Pleading and Practice—Motions to Strike—Restoration to Files.

Pleading and Practice—Motion to Strike—Effect.

1. Under the civil practice, a motion to strike out a portion of a pleading is in fact and in substance a demurrer to the portion attacked.

Same—Remedies.

2. When a demurrer to a pleading is sustained, the pleader may either take exception to the ruling, stand on his original pleading, permit judgment to go against him, and appeal therefrom, or submit to the ruling and plead over; the two courses, however, being antagonistic in principle, cannot be adopted concurrently.

Same—Amended Pleadings—Originals *Functus Officio*.

3. Where, after a motion to strike allegations from written objections to a petition for letters of administration had been sustained, the opponent obtained an extension of time to file amended pleadings, the original ones became *functus officio*.

Same—*Mandamus*—When Writ Does not Lie.

4. *Mandamus* does not lie to compel the district court to restore matter stricken from pleadings, where the party seeking relief had asked for and secured time to file amended pleadings, thus treating the original ones as *functus officio* and leaving nothing to which restoration could be made.

Original application by the State, on the relation of Mayme Ronan Juckem, for a writ of mandate against the District Court of the Second Judicial District in and for the County of Silver Bow, and J. J. Lynch, a Judge thereof. Writ denied.

Messrs. Nolan & Donovan and *Messrs. Walker & Walker*, for Relatrix, submitted a brief; *Mr. T. F. Nolan* argued the cause orally.

Mr. Peter Breen and *Mr. H. K. Jones*, for Respondents, submitted a brief; *Mr. Jones* argued the cause orally.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

Katherine Ronan Morressey died, in the city of Butte, on the twenty-eighth day of March, 1919. On April 17, 1919, Edward Morressey, husband of decedent, filed his petition for letters of administration, which was duly noticed for hearing, and thereafter relatrix filed her written objections and opposition to such petition, and thereupon petitioner filed written motion to strike from said written opposition and objections certain alleged irrelevant and immaterial matter. The motion was sustained, and the matter stricken on the fifteenth day of November, 1919, and, as the minute entry of the court recites: "Said objector, upon application of her counsel, T. F. Nolan, Esq., is given thirty days to file amended written opposition and objections." The entry further recites: "To which ruling of the court counsel for Mayme Ronan Juckem excepted and asked for and was by the court granted thirty days to prepare and serve a bill of exceptions." Whether or not relatrix availed herself of the opportunity to plead over, thus requested and granted, does not appear, as the certified record closes with the minute entry of November 15, 1919.

On December 29, 1919, relatrix filed in this court her affidavit and petition for a writ of mandate to compel respondents to reinstate such stricken matter, and an order to show cause why such writ, or other proper writ commanding such action, should not be issued, was served upon respondents. Respondents filed a motion to quash, and without waiving their rights under the motion filed an answer to the petition, setting up and submitting the record.

Except as otherwise provided in the title on "Probate Proceedings," the general rules of practice and procedure in civil matters apply to probate proceedings. (Rev. Codes, sec. 7711.) [1] Under our civil practice, "a motion to strike out a portion of a pleading is in fact and in substance a demurrer to that portion attacked." (*Bank of Commerce* v. *Fuqua*, 11 Mont. 285, 28 Am. St. Rep. 461, 14 L. R. A. 588, 28 Pac. 291.)

Under the civil practice, when a trial court sustains a demur-
[2] rer to a pleading, two courses are open to the pleader: He may either take exception to the ruling of the court and stand upon his original pleading, permit the matter to go to judgment and test the correctness of the court's ruling on an appeal from the judgment, or he may submit to the ruling of the court and plead over. But these two courses are antagonistic in principle and cannot be adopted concurrently. The first is in opposition to, the second an acquiescence in, the ruling of the court.

By applying for and being granted time in which to fur-
[3] ther plead, relatrix acquiesced in the ruling of the court, and thereby abandoned her original pleading, which then became *functus officio*. This rule has been so firmly established in this jurisdiction by a long list of authorities that it cannot be disregarded. (*Raymond* v. *Thexton*, 7 Mont. 299, 17 Pac. 258; *Newell* v. *Meyendorff*, 9 Mont. 254, 18 Am. St. Rep. 738, 8 L. R. A. 440, 23 Pac. 333; *Gettings* v. *Buchanan*, 17 Mont. 581, 44 Pac. 77; *Butte B. Co.* v. *Clarke*, 19 Mont. 306, 48 Pac. 303; *Ben Kress Nursery Co.* v. *Oregon Nursery Co.*, 45 Mont. 494, 124 Pac. 475; *Lehfeldt Co.* v. *Justice*, *ante*, p. 221, 187 Pac. 912.)

In the case of *Gettings* v. *Buchanan*, an amended complaint had been filed, after answer. Defendant then asked for and was granted additional time within which to file an amended answer. The court held that, under the circumstances, the old answer would have been sufficient answer to the amended complaint, and would have been so treated had defendant elected to stand on the old answer. The court then says: "On the contrary, he himself elected to file a new answer. As appears from the record, after a portion of the time had run in which he could answer, fifteen days were granted him in which to plead to the amended complaint, and he participated in this proceeding of the court." After reviewing numerous cases in point in both England and this country, the court concludes: "We are of the opinion that the defendant in this case clearly elected to consider his original answer

as also *functus officio*, and that, by his conduct, a new answer became due, and that for want of the same default was properly entered."

So in this case, by her action, by participating in the proceed-
[4] ing of the court, asking for and securing time beyond that which was allowed by statute in which to plead further, relatrix elected to consider her original objections and written opposition *functus officio;* and there is now no such pleading to which the stricken matter could be restored, should we find that the court's action in striking it was erroneous. Certainly, it cannot be "restored" to the amended written opposition and objections, if such were filed pursuant to the permission secured by relatrix on her own motion.

The proceedings are dismissed, and it is ordered that respondents have judgment for their costs and disbursements herein.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY and HURLY concur.

MR. JUSTICE COOPER, being absent, takes no part in the foregoing decision.

SPAULDING, APPELLANT, *v.* MAILLET, RESPONDENT.

(No. 4,366.)

(Submitted February 13, 1920. Decided February 24, 1920.)

[188 Pac. 377.]

Attorney and Client—Contracts—Procuring Pardon—Invalidity—Public Policy—Costs—Witnesses—Mileage and Per Diem.

Contracts—Public Policy—Definition.

1. "Public policy" is that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or is against public good, and is declared by the Constitution and statutes and, in the absence of declarations by either, by the decisions of the courts.

Same—Attorney and Client—Procuring Pardon—Validity of Contract.

2. Whether a contract to pay for services to be rendered in procuring or attempting to procure a pardon is valid or void, upon the theory that such a contract contemplates interference with the pardoning power, depends upon the character of the services contemplated.

[As to the validity of contract to procure pardon or parole, see note in Ann. Cas. 1917D, 890.]

Same—Attorney and Client—Public Policy.

3. Contracts between attorney and client for the employment and compensation of the former for his services, form no exception to the rule that contracts which contravene public policy are invalid and cannot be enforced.

Same—Attorney and Client—Procuring Pardon—When Contract Valid, When not.

4. If a contract between an attorney and one convicted of crime, to procure the latter's pardon, provides for the rendition of purely professional services, such as the drafting and presentation of a petition, the collection of information regarding the convict, *etc.*, it should be upheld; if, however, it contemplates favorable action through personal influence and solicitation, it should be condemned as contrary to good morals and sound public policy.

Same—Attorney and Client—Procuring Pardon—Invalidity of Contract.

5. *Held*, that a contract between an attorney and one convicted of the crime of introducing intoxicating liquors on an Indian reservation, under which the former should use his personal influence and friendship with a United States district attorney to secure from the latter a recommendation for the convict's pardon, was void as against public policy, the facts that unlawful means in carrying out the contract were not resorted to nor contemplated and that no injustice resulted to anyone from the execution of the contract being immaterial.

Same—Public Policy—Construction.

6. Courts are reluctant to declare agreements void as against public policy if by any reasonable construction they can be upheld.

Same—Rules of Interpretation—When not to be Resorted to.

7. Resort to the rules of interpretation to uphold a contract is not admissible if its meaning is free from doubt.

Same—Ambiguity—Construction.

8. Consideration of the circumstances surrounding the making of a contract and the probable intent of the parties, may be had only when the agreement is ambiguous in some of its terms.

Costs—Witnesses—Mileage and *Per Diem*—Proper Allowance.

9. In the absence of a clear showing of bad faith on the part of the prevailing party in calling a witness, the trial court's action in allowing him mileage and *per diem* will not be interfered with on appeal, the fact that the testimony was immaterial to any issue made by the pleadings not changing the rule.

Appeal from District Court, Lewis and Clark County; R. Lee Word, Judge.

ACTION by C. A. Spaulding against Albert Maillet. Judgment for defendant, and plaintiff appeals. Affirmed.

Cause submitted on briefs of Counsel.

Mr. A. P. Heywood, for Appellant.

The contract sued on is one contemplating the services of appellant as an attorney in and about an effort to procure a pardon for the respondent, who had theretofore pleaded guilty to a felony, to-wit, that of introducing liquor upon an Indian reservation. Under the evidence, and the implied finding of the trial court that the contract was entered into, appellant was clearly entitled to recover unless such contract can be said to be contrary to public policy. That it is not so contrary to public policy is clear upon an application to the evidence of proper legal principles sustained by ample authority. (13 Corpus Juris, pp. 433, 434; 6 R. C. L., p. 766; *Moyer* v. *Cantieny,* 41 Minn. 242, 42 N. W. 1060.)

One of the leading cases on the subject under consideration is that of *Gordon* v. *Gordon,* 168 Ky. 409, Ann. Cas. 1917D, 886, L. R. A. (n. s.) 1916D, 576, 182 S. W. 220. In that case the court of appeals of Kentucky had under consideration a contract practically identical with the one in the case at bar, save and except that it was a contract to secure a parole instead of a pardon. The contract was held not to contravene public policy notwithstanding a statute of that state denounced a penalty against any person aiding or assisting in procuring the granting or refusing of a pardon, where such services were to be rendered for a fee or reward. Additionally it should be borne in mind that by proper statutory enactment, and by the rules and regulations of the Department of Justice, it has been provided that a person convicted of a crime may apply for a pardon. The object of the contract in question, therefore, was wholly lawful, and the principle laid down by the case last cited becomes necessarily applicable. For if the object of the contract is lawful, and no unlawful means were contemplated or used in carrying it out, it assuredly cannot contravene public policy. (See, also, *Bergen* v. *Frisbie,* 125 Cal. 168, 57 Pac. 784; *Chadwick* v. *Knox,* 31 N. H. 226, 64 Am. Dec. 329; *McBratney* v. *Chandler,*

22 Kan. 692, 31 Am. Rep. 213.) Nor is it important whether respondent believed at the time the contract was entered into that improper influence would be brought to bear in performing the same. (*Mulligan* v. *Smith*, 32 Colo. 404, 76 Pac. 1063.)

Messrs. Patterson, Heyfron & Simes, for Respondent.

The question here presented is as follows: Is the contract of an attorney to use his personal influence with a public official to secure a pardon void as against public policy? Perhaps the clearest statement of the rule is found in the annotation to the case of *Gordon* v. *Gordon*, L. R. A. 1916D, 580, as follows: "Though there is some conflict of opinion, contracts entered into to obtain a pardon or commutation of sentence have generally been upheld where the services contemplated are not other than the proper presentation of the case before the pardoning power. Where, however, personal interest enters into the success of the contract, or the use of personal influence is contemplated, the general rule is that the contract is illegal as against public policy and so unenforceable." In fact, the rule that a contract for the use of personal influence to affect the action of a public official is always void, whether it pertain to legislative, executive or judicial action. (6 R. C. L. 741; *Deering & Co.* v. *Cunningham*, 63 Kan. 174, 54 L. R. A. 410, 65 Pac. 263; *Moore* v. *Hyde*, 39 S. D. 196, 163 N. W. 707.)

In the case of *Bremsen* v. *Engler* (1883), 17 Jones & S. (N. Y.) 172, it was held that a contract to procure a pardon made by a person who was not an attorney would be objectionable because it would appear on its face that the means to be employed were influence or personal solicitation or some others equally objectionable.

The essence of the illegality in this case, lies in the fact that it was sought to influence official action, not by an appeal to reason or argument, but by an appeal to personal friendship; this is fundamentally illegal. Moreover, the illegality was increased by the fact that the personal friendship was said to be used for a pecuniary consideration. Either one of these

elements makes the contract illegal. (*Chippewa Valley etc. R. Co.* v. *St. Paul & O. R. Co.*, 75 Wis. 224, 6 L. R. A. 601, 44 N. W. 17.) The underlying principles of all cases like the above are clearly set forth in the case of *Buck* v. *First Nat. Bank*, 27 Mich. 293, 15 Am. Rep. 189.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In June, 1917, Albert Maillet entered a plea of guilty to the charge of introducing intoxicating liquors on an Indian reservation, and was sentenced to imprisonment in the county jail of Lewis and Clark county for sixty days and to pay a fine of $100. Immediately after judgment was pronounced, Maillet employed C. A. Spaulding, an attorney engaged in the practice of the law at Helena, to prepare a petition to the President for a pardon. The services were rendered and paid for, and the employment terminated. Several days passed, and Maillet, not having heard from his petition, called Mr. Spaulding to the jail to obtain his opinion as to the cause of the delay, and was informed that it was doubtless due to the failure to have the petition accompanied by a favorable recommendation of the United States district judge or district attorney. Maillet then inquired whether Mr. Spaulding would undertake to secure the necessary recommendation, and what followed is told by Mr. Spaulding in his testimony, given upon the trial of this case, as follows: "I said to him, 'If I am to represent you in this matter, using my personal friendship to go to the district attorney's office and secure that kind of a recommendation for you, I am going to make a substantial charge.' He said, 'What do you mean by a substantial charge?' I said, 'I will charge you $300.' He said that was satisfactory, and I needn't worry about the money; that it would be forthcoming as soon as we received the pardon, or commutation of his sentence; he didn't care particularly which it was; his idea was to get back to his wife, or get back to his farm. His wife, I think, was over here at the time, and I think I saw her on one or two occasions at the jail.

Acting under that arrangement, that I have mentioned, I went to Mr. Homer Murphy, whom I have known for a good many years, who is a very close personal friend of mine. He is assistant United States attorney for this district, and was at that time and I asked him if he would, as a personal favor to me, send off a telegram to the Department of Justice, recommending that favorable action be had in Maillet's case. I think the suggestion came from someone—I am not certain who it came from—at any rate Mr. Heyfron came over from Missoula about it, and had an examination of Maillet made as to his physical condition not being good, as an additional reason for asking leniency from the Department of Justice. Acting at my request, Mr. Murphy wrote out in my presence there in the federal building a lengthy telegram to the attorney general. I cannot recall the date of it; but I know the telegram in some respects was not quite satisfactory to me. At any rate, I thought it ought to be made a little stronger in some particulars, and my recollection is that it was strengthened, and some suggestions of my own incorporated in it. In addition to that I wrote to Congressman Evans on behalf of Maillet. He said that he knew that his people knew Evans; and we awaited returns." About August 15, the President commuted the sentence to expire at once, but did not remit the fine. Thereafter this action was brought to recover the agreed compensation. Issues were joined, and a trial had to the court without a jury, which resulted in a judgment dismissing the action and for defendant's costs. From that judgment this appeal is prosecuted.

The trial court held that the contract contravenes the public policy of the state and is void, and the correctness of that conclusion is drawn in question here.

Public policy is that principle of law which holds that no [1] citizen can lawfully do that which has a tendency to be injurious to the public or against public good. (*Lawson* v. *Cobban*, 38 Mont. 138, 99 Pac. 128.) The public policy of the state is declared by the Constitution and statutes, and, in the absence of declarations by either, then by the decisions of the

courts. (*Parchen* v. *Chessman*, 49 Mont. 326, Ann. Cas. 1916A, [2] 681, 142 Pac. 631, 146 Pac. 469.) In the early English and American cases it was held quite uniformly that any contract to pay for services rendered in procuring, or attempting to procure, a pardon was void upon the theory that such a contract contemplated interference with the pardoning power, which should be as free from improper bias or influence as the trial of the convict before the court. (*Norman* v. *Cole*, 3 Esp. 253; *McGill's Admr.* v. *Burnett*, 7 J. J. Marsh. (Ky.) 640; *Hatzfield* v. *Gulden*, 7 Watts (Pa.), 152, 31 Am. Dec. 750; *Kribben* v. *Haycraft*, 26 Mo. 396.) By the more recent decisions the rule has been modified to the extent that the contract will be declared to be valid or invalid, depending upon the character of the services contemplated. (*Bergen* v. *Frisbie*, 125 Cal. 168, 57 Pac. 784; 6 R. C. L. 766.)

The facts of this case distinguish it from any other to which [3] our attention has been directed, but the principles involved are neither novel nor difficult of application. Contracts between attorney and client for the employment and compensation of the former for his services form no exception to the rule that contracts which contravene public policy are invalid and cannot be enforced. (2 R. C. L. 1041.)

From the authorities are deducible the following principles [4] applicable to the facts of this case: (a) If the contract provides for the rendition of purely professional services, such as the drafting and presentation of a petition for pardon, the collection of information regarding the convict, his former course of conduct, his deportment since the commission of the offense, the probability of his reformation, and, generally, the preparation and submission of arguments addressed to the judgment of the proper officer, and services of like character, it should be upheld. (*Trist* v. *Child*, 21 Wall. 441, 22 L. Ed. 623; *Buck* v. *Bank*, 27 Mich. 293, 15 Am. Rep. 189; *McBratney* v. *Chandler*, 22 Kan. 692, 31 Am. Rep. 213; *Chadwick* v. *Knox*, 31 N. H. 226, 64 Am. Dec. 329; *Moyer* v. *Cantieny*, 41 Minn. 242, 42 N. W. 1060.) (b) If the contract contemplates the introduction of

personal influence and solicitation as elements in procuring favorable action from those in authority, then it should be condemned as contrary to good morals and sound public policy. (*Moore* v. *Hyde*, 39 S. D. 196, 163 N. W. 707; *Houlton* v. *Nichol*, 93 Wis. 393, 57 Am. St. Rep. 928, 33 L. R. A. 166, 67 N. W. 715; 2 R. C. L. 1041; 6 R. C. L. 741, 766; 13 C. J. 433; note to *Gordon* v. *Gordon*, L. R. A. 1916D, 580.) Personal influence in such matters is not the subject of bargain and sale—is not a vendible article in our system of laws; and to anyone who assumes to sell his influence, the courts will not lend their aid to collect the price. (*Oscanyan* v. *Arms Co.*, 103 U. S. 261, 26 L. Ed. 539 [see, also, Rose's U. S. Notes]; *Chippewa Valley & R. Co.* v. *Chicago etc. R. Co.*, 75 Wis. 224, 6 L. R. A. 601, 44 N. W. 17.) The reason for the rule is obvious. Public office is a public trust to be exercised, not to reward friends or punish enemies, but solely from considerations of duty and for the public good; therefore there cannot be room for the introduction of the element of personal influence when official action is required.

With these general principles in view, what shall be said of **[5]** the contract in question? Its terms are to be construed in the light of the surrounding circumstances. Maillet had made application for pardon, but apparently no action had been taken upon it by the authorities at Washington. It required the favorable recommendation of the district judge or district attorney. Mr. Murphy was assistant district attorney, and apparently had it within his power to grant or refuse the recommendation. From the opening sentence of plaintiff's testimony above, it would seem clear that he contracted to use his personal friendship with the assistant district attorney as the means for obtaining the desired recommendation, but if any doubt arises upon this subject, the construction of the contract by the plaintiff himself eliminates it beyond controversy. He testified: "Acting under that employment, I went to Mr. Murphy, who is a very close personal friend of mine, and I asked him if he would, *as a personal favor to me*, send off a telegram to the Department of Justice, recommending that favorable action be

had in Maillet's case." The recommendation was requested, not because of the merits of Maillet's application, but as a personal favor to Mr. Spaulding. It is insisted, however, that this evidence demonstrates that unlawful means in carrying out the contract were neither resorted to nor contemplated. If this be conceded, it does not aid plaintiff, for that is not the test. The supreme court of the United States has said that contracts of this character "are void as against public policy without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country." (*Tool Co.* v. *Norris*, 2 Wall. 45, 17 L. Ed. 868 [see, also, Rose's U. S. Notes]; see, also, *Deering & Co.* v. *Cunningham*, 63 Kan. 174, 54 L. R. A. 410, 65 Pac. 263; *Kuhn* v. *Buhl*, 251 Pa. 348, Ann. Cas. 1917D, 415, 96 Atl. 977.)

The contract clearly contemplated the employment of personal influence and solicitation, and this is forbidden by public policy. Section 5051, Revised Codes, provides: "That is not lawful which is * * * (2) contrary to the policy of express law, though not expressly prohibited; or (3) otherwise contrary to good morals."

It is no argument to say that no injustice resulted to anyone from the execution of the contract. A reversal of this judgment would constitute a vindication—a judicial approval of an agreement which, to an unscrupulous attorney, would warrant employment for the most vicious lobbying purposes.

The statutes of this state recognize the right of parties to [6–8] enter into contracts, and the courts are ever reluctant to declare their agreements void as against public policy, and will refuse to do so if by any reasonable construction they may be upheld; but the right to contract has very substantial limitations imposed by section 5051 above, and other provisions of the law, and resort to the rules of interpretation to uphold a contract is never admissible if the meaning of the contract is free from doubt. (*Ming* v. *Pratt*, 22 Mont. 262, 56 Pac. 279.)

Consideration of the surrounding circumstances and the probable intent of the parties may be had only when the contract is ambiguous in some of its terms. (*Bullard* v. *Smith*, 28 Mont. 387, 72 Pac. 761.) The terms of the contract in question, as they are laid bare by the testimony of the plaintiff, seem to us to admit of but one construction, and that the one given above.

Error is predicated upon the refusal of the trial court to strike [9] from defendant's cost bill the items for *per diem* and mileage of the witness Gutz. It is insisted that the evidence given by the witness was altogether immaterial to any issue made by the pleadings. The contention is determined adversely to the plaintiff by the former holding of this court. In *Isman* v. *Altenbrand*, 42 Mont. 188, 111 Pac. 849, this same question was presented and disposed of as follows: "It is true that the testimony of the witness Roberts was mostly hearsay; but it often happens that in the conduct of trials witnesses fail to give competent or material evidence and are excused without having been of any material assistance to the party calling them. In the absence of bad faith, however, it has never been the practice to refuse to tax the mileage and *per diem* of such witnesses against the defeated party. Bad faith in such a case must be clearly shown to the satisfaction of the court."

The trial court was apparently not satisfied from the showing made that the defendant acted in bad faith in calling the witness Gutz, and we are not warranted in interfering with its conclusion.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY and MATTHEWS concur.

MR. JUSTICE COOPER, being absent, takes no part in the foregoing decision.

Rehearing denied March 22, 1920.

STATE EX REL. JERRY, RELATOR, *v.* DISTRICT COURT ET AL., RESPONDENTS.

(No. 4,546.)

(Submitted January 19, 1920. Decided February 24, 1920.)

[188 Pac. 365.]

Supervisory Control—Default Judgment—Vacation—Irregularity in Summons—Harmless Error.

Summons—Indorsement of Name of Plaintiff's Attorney—Purpose of Requirement.

1. The purpose of the requirement of section 6515, Revised Codes, that the name of plaintiff's attorney must be indorsed on the summons, is to advise defendant who plaintiff's attorney is, so that he may know to whom notice must be given of any step he may desire to take in his defense.

Same—Failure of Indorsement of Attorney's Name—Insufficient Ground for Vacation of Default Judgment.

2. *Held*, on application for writ of supervisory control to annul an order vacating a default judgment made because the name of plaintiff's attorney had not been indorsed on the summons, that defendant having been served with a copy of the complaint upon which appeared the name of such attorney and, in pursuance of the knowledge thus gained, discussed a compromise of the case with him, the substantial rights of defendant were not injuriously affected by the omission, and that vacation of the judgment was error.

District Courts—Procedural Irregularities—Harmless Error.

3. Under section 6593, Revised Codes, district courts must, at every stage of a case, disregard procedural irregularities and omissions which do not affect the substantial rights of the parties.

Supervisory Control—Lies When.

4. The fact that an appeal is available to relator on application for writ of supervisory control is not conclusive of his right to the relief prayed for, if the case presented is exigent and the remedy by appeal is inadequate.

Original application by the State, on the relation of H. E. Jerry, for writ of supervisory control to annul an order of the District Court of the Eighteenth Judicial District in and for the county of Hill, vacating a default judgment. Order annulled.

Mr. Frank N. Utter and *Messrs. McIntire & Murphy*, for Relator, submitted a brief; *Mr. Homer G. Murphy* argued the cause orally.

Mr. Jos. P. Donnelly, for Respondents, submitted a brief and argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Original application to this court for an order under its supervisory power to annul an order of the district court of Hill county vacating a judgment.

On October 3, 1919, the relator commenced an action in the district court of Hill county against M. O'Connell, to recover of him damages for injury alleged to have been done by him to relator's property. Because of his failure to obtain service of the original summons issued upon the filing of the complaint, the relator procured the issuance of an *alias* summons. This was served on O'Connell by delivery to him of a copy attached to a copy of the complaint. It did not set forth, either on its face or by indorsement on the back, the name of relator's attorney, but the complaint and the copy served on O'Connell were signed by the attorney, and his name was indorsed thereon. After service and before O'Connell was in default, he called on the attorney of relator at his office and discussed with him a possible compromise of the action, saying that he still had five days in which to appear to make his defense. No appearance was thereafter made by him. His default was entered, and, upon proof furnished by the relator, judgment rendered and entered on November 13, 1919. Execution was thereupon issued, and levy made by the sheriff thereunder upon O'Connell's property sufficient to satisfy the judgment. On December 30, 1919, O'Connell applied to the court for an order vacating and setting aside the judgment, the execution and all proceedings under it, and directing the property held by the sheriff to be returned to O'Connell, on the sole ground that the name of relator's attorney was not indorsed upon the *alias* summons. The application was made, and the order was granted without notice to relator. Thereupon this proceeding was brought to have the order annulled. In response to the order to show cause

issued by this court, the defendant court appeared by counsel and filed a motion to quash and to dismiss the proceeding, alleging several grounds, all of which are included in the general ground that the facts stated in the petition are not sufficient to warrant relief. Upon the questions so raised, the proceeding was submitted for final decision.

1. The provisions of the Revised Codes pertinent here are the following: Section 6515, after prescribing the form and contents of the summons in a civil action, declares: "The name of the plaintiff's attorney must be indorsed on the summons." Section 6518 prescribes how the summons must be served. It contains this provision: "A copy of the complaint must be served with the summons, unless one or more defendants are residents of the same county, in which case a copy of the complaint need only be served upon one of such defendants." Section 8061 provides: " * * * The Code establishes the law of this state respecting the subjects to which it relates, and its provisions, and all proceedings under it, are to be liberally construed with a view to effect its objects and to promote justice." Section 6593 declares: "The court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

We think that if any force is to be given to the last three sections, construed in connection with section 6515, the order complained of was wholly unwarranted. It is true that the language of section 6515 is mandatory in terms. Hence this court has consistently held that an omission by the clerk to embody in the summons the contents prescribed by it, or to subscribe his name, or to affix his seal to it renders it fatally defective, so that, by service of it, the court does not acquire jurisdiction of the defendant. (*Sawyer* v. *Robertson*, 11 Mont. 416, 28 Pac. 456; *Choate* v. *Spencer*, 13 Mont. 127, 40 Am. St. Rep. 425, 20 L. R. A. 424, 32 Pac. 651; *Sharman* v. *Huot*, 20 Mont. 555, 63 Am. St. Rep. 645, 52 Pac. 558; *Duluth Brewing Co.* v. *Allen*,

51 Mont. 89, 149 Pac. 494.) There was not in this case a compliance with the provision quoted above; for the name of the attorney did not appear upon the summons at all, but at the end of the complaint and by indorsement on the back of it. The [1] evident purpose of requiring the indorsement is to furnish the defendant with knowledge who the attorney of the plaintiff is, so that he may know to whom notice must be given of any step he may desire to take in his defense. (*Shinn* v. *Cummins*, 65 Cal. 98, 3 Pac. 133; *Foore* v. *Simon Piano Co.*, 18 Idaho, 167, 108 Pac. 1038.)

If it were not apparent that O'Connell did not suffer preju- [2] dice by the clerk's omission, we should be inclined to dismiss this application, for the provision is expressed in the same mandatory terms as are all the other provisions contained in the section; but section 6518 requires a copy of the complaint to be served with the summons. The name of relator's attorney appeared at the bottom of this copy and upon the back of it. That O'Connell gained from this the knowledge which section 6515 requires to be given him by the summons is apparent from the fact that he called on relator's attorney at his office and discussed a compromise of the case with him. Under these circumstances we think the maxim, "When the reason of a rule ceases, so should the rule itself," applies. (Rev. Codes, sec. 6178.) This seems necessary when we consider that by section 8061 the Code and all proceedings under it "are to be liberally construed with a view to effect its objects and to promote justice." In addition to this injunction, the courts are commanded by section 6593 to disregard any error or defect which does not affect the substantial rights of the parties. Commenting upon this section, in *Copenhaver* v. *Northern Pac. Ry. Co.*, 42 Mont. [3] 453, 113 Pac. 467, this court said: "We doubt if the bench and bar of the state have given this statute the consideration, scope, force and effect to which it is entitled. It is plain and requires no interpretation. This court is commanded to give judgment on appeal without regard to errors which do not affect the substantial rights of the parties. The statute was designed

to prevent reversals of causes wherein substantial justice has already been done. It was intended to put a speedy end to litigation, when that object can be attained without injustice." What was there said had reference particularly to the duty of this court in reviewing cases brought here by appeal; but the statute is directed none the less to the district courts, and it is equally their duty at every stage of every case to obey its injunction. Therefore, though the clerk did not obey the mandatory direction of section 6515, O'Connell could not, after having been informed of the name of the attorney and having acted upon this information, claim that his substantial rights had been affected in the least.

The supreme court of Idaho has held that, since a provision similar to that in section 6515, *supra*, has no reference to the form and contents of the summons, it is merely directory, and hence, when service is by publication, the omission to print the name of the attorney with the published summons is not fatal. (*Foore* v. *Simon Piano Co., supra.*) We are not disposed to go so far as this, because it is not necessary. We are not ready to say that when there are two or more defendants residing in the same county, the information conveyed to one of them by the copy of the complaint, as here, though acted upon by him, would be a sufficient compliance with the statute as to the one or more defendants not served with such a copy. We go no further than to hold that under the circumstances of the instant case the defendant ought not to be heard to complain that he suffered prejudice.

Several cases are cited by counsel for relator in support of their position that the respondent court was in error in vacating the judgment. None of them are directly in point in their facts, but all of them support the conclusion that a defendant who cannot, or does not, show that he has suffered prejudice is not entitled to complain of the clerk's omission. We cite those which are more directly in point: *Shinn* v. *Cummins, supra; Foore* v. *Simon Piano Co., supra; Serrano* v. *Berdiel,* 22 Porto Rico, 416; *People* v. *Wrin,* 143 Cal. 11, 76 Pac. 646; *Lee* v. *Clark,*

53 Minn. 315, 55 N. W. 127; *Mabbett* v. *Vick*, 53 Wis. 158, 10 N. W. 84.

2. It is true that relator has an appeal from the order. That [4] this is so, however, is not conclusive of his right to relief in this proceeding. In the early case of *State ex rel. Whiteside* v. *District Court*, 24 Mont. 539, 63 Pac. 395, this court held that this proceeding may be resorted to even though the relator has an appeal, if the case is exigent and the remedy by appeal is inadequate. It appears that the relator had secured certain satisfaction of his judgment by a levy by the sheriff upon sufficient property belonging to O'Connell. The sheriff was, by the order of the district court, directed to release the levy and return the property to O'Connell. In the meantime, pending the appeal which in regular course could not be heard earlier than after the lapse of two years, the property would be almost certainly disposed of, and the relator thus defeated in having satisfaction of his judgment. In our opinion, this made the case sufficiently exigent to justify his application to this court for relief.

The order is annulled.

Order annulled.

ASSOCIATE JUSTICES HOLLOWAY, HURLY and MATTHEWS concur.

MR. JUSTICE COOPER, being absent, takes no part in the foregoing decision.

INTERSTATE LUMBER CO., RESPONDENT, *v.* MAGILL-NEVIN PLUMBING & HEATING CO., INTERVENER AND APPELLANT.

(No. 4,090.)

(Submitted January 17, 1920. Decided February 24, 1920.)

[188 Pac. 144.]

Mechanics' Liens—Invalidity—Defective Notice—Error in Name of Owner of Property—Intervention.

Mechanics' Liens—Compliance With Statutory Requirements Necessary to Validity.

1. While the mechanic's lien statute is remedial, its requirements must be complied with.

Same—Defective Notice—Error in Name of Owner of Property.

2. A notice of a mechanic's lien claim which instead of setting forth the name of the owner of the property sought to be charged, stated that the lienor was the owner, was fatally defective.

Same—Validity—How Tested.

3. The validity of a mechanic's lien must be tested by the description contained in it, and it is only in case of ambiguity that it may be explained and the property identified by oral evidence.

Same—Intervention—Dependent upon What.

4. The right of one to intervene in a suit to foreclose a mechanic's lien is dependent upon the existence of a valid lien and the interest he thereby has in the subject matter of the action commenced by plaintiff; hence where intervener's notice of lien was so defective as not to support the lien, a demurrer to the complaint in intervention was properly sustained even though it stated a cause of action on contract.

Appeal from District Court, Silver Bow County; J. B. McClernan, Judge.

ACTION by the Interstate Lumber Company against Henry Umhang and S. W. Billings for the foreclosure of a mechanic's lien, in which the Magill-Nevin Plumbing & Heating Company intervened. A demurrer was sustained to the complaint in intervention, and a judgment entered in favor of defendant Billings. The intervener appeals. Affirmed.

Mr. Chas. R. Leonard and *Mr. Earle N. Genzberger*, for Appellant, submitted a brief; *Mr. Leonard* argued the cause orally.

Mr. James H. Baldwin, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE HURLY delivered the opinion of the court.

In an action instituted by the Interstate Lumber Company against Henry Umhang and S. W. Billings for the foreclosure of a mechanic's lien, the Magill-Nevin Plumbing & Heating Company, after obtaining leave of court, filed a complaint in intervention, to which plaintiff and defendant Umhang each filed answer. Defendant Billings demurred thereto. The demurrer was sustained, and judgment was entered in favor of Billings as against the intervener, from which judgment the intervener appeals.

The pleadings set forth that Umhang was the owner of certain lots in Butte, and contracted with Billings for the erection of a dwelling thereon, and that the latter entered upon the construction of a building; that thereafter Umhang and Billings engaged the plumbing company to install the plumbing in the building; also that for use in the construction of the house Billings purchased lumber from the plaintiff. Thereafter during the statutory period the plaintiff and the intervener each filed liens seeking to charge the property with the value of the material furnished by each.

The question raised by the demurrer is whether the lien claim of the intervener is sufficient in law to constitute a valid lien against the property. The notice of lien claim, so far as material, is as follows:

"Magill-Nevin Plumbing & Heating Co., a Corporation,
Lienor,

v.

"Henry Umhang,
Lienee.

"Notice is hereby given that the Magill-Nevin Plumbing & Heating Company * * * performed work upon and furnished material and fixtures for that certain building * * * designated as No. 129 East Aluminum street, Butte, Mont.

"That said material and fixtures were actually furnished and said work and labor were actually performed in the improvement of said building and consisted in doing plumbing work and furnishing plumbing material for said building in accordance with the contract and according to the account hereto attached marked 'Exhibit A.'

"That said work and labor was performed and said materials and fixtures were furnished by the said lienor at the special instance and request of said lienee. * * *

"That a just and true statement of the account therefor is hereto annexed, marked 'Exhibit A,' and made a part hereof, and that the same is a just and true account of the amount due, owing, and unpaid said lienor by said lienee on account of said work and material, after allowing all credits, to-wit, $345.

"That the said *lienor* is the owner of the above-described real estate, including said building thereon situate.

"That the said Magill-Nevin Plumbing & Heating Company * * * therefore claims a lien on said above-described real estate * * * in the sum of $345, together with interest * * * from July 9, 1914, the date when the balance was ascertained as the amount due, owing, and unpaid to said lienor by said lienee for work and labor thereon performed and fixtures and materials furnished as hereinbefore set forth."

This court, in the case of *Missoula Mercantile Co.* v. *O'Donnell,* 24 Mont. 65, 60 Pac. 594, 991, upon the original hearing, and later, after a rehearing, held clearly and unequivocally that a lien which fails to set forth the name of the owner whose interest is sought to be affected and charged is fatally defective. In the later case of *Cook* v. *Gallatin R. Co.,* 28 Mont. 340, 72 Pac. 678, the rule established in the *O'Donnell Case, supra,* was reaffirmed.

The lien set forth in the complaint in intervention certainly fails to assert a claim of lien against the property of Umhang, whose property is sought to be charged with the lien of the [1, 2] original plaintiff. In so many words it says that the

lienor (Magill-Nevin Plumbing & Heating Company) is the owner, not Umhang.

The rule is well settled in this state by many decisions of this court, commencing with *Black* v. *Appolonio*, 1 Mont. 342, that while the statute is remedial in character, its requirements must be complied with. As said in *McGlauflin* v. *Wormser*, 28 Mont. 177, 72 Pac. 428: "The manner of perfecting a mechanic's lien consists of various steps, which are purely statutory, and, while the statute is in some respects remedial in its nature, and thus far should be construed liberally, it creates a new right, and the statutory proceedings by which this new right is perfected and enforced must be strictly followed."

Instances are conceivable wherein an owner may file a lien affecting his own property—*i. e.*, where the owner has furnished material to a tenant to be used in improving demised premises—in which event the owner might possibly file a lien against the property for the purpose of reaching the tenant's interest. In this case, however, it clearly appears from the allegations of the complaint that Umhang was the owner of the property, and that it is against his property that the foreclosure is attempted, while the lien itself asserts a claim against the property of the plaintiff in intervention, thus creating a variance between the allegations in the body of the complaint and the statements contained in the lien, which is the basis of the cause of action asserted by plaintiff in intervention.

Council cites us to the case of *Ivanhoff* v. *Teale*, 47 Mont. 115, 130 Pac. 972, which was a suit for the enforcement of a statutory lien; the complaint stating that "the defendant actually completed all the work," *etc.*, whereas it should have stated that the "plaintiff" did the work. It was there contended that the complaint did not state facts sufficient to constitute a cause of action because of this error. The court said: "This contention is without merit. It is apparent that the pleader, in drawing the complaint, inadvertently substituted the term 'defendant' where he intended to use the term 'plaintiff.' At most, this substitution of terms served only to render the pleading open to ob-

jection by special demurrer on the ground of uncertainty. Such a defect is waived by answer to the merits." However, the grounds of demurrer here fully reached the defect in question, and there has been no answer on the merits. It should be borne in mind also that, while our statute permits amendments of pleadings, we have none permitting amendments of mechanics' liens.

Even while the statute (section 7291) provides that any error or mistake in the account or description does not affect the [3] validity of the lien if the property can be identified by the description, the validity of the lien must be tested by the description contained in it. It is only in cases of an ambiguity that it may be explained and the property identified by oral evidence. (*Johnson* v. *Erickson,* 56 Mont. 550, 185 Pac. 1116.)

In *Goodrich Lumber Co.* v. *Davie,* 13 Mont. 76, 81, 32 Pac. 282, 283, it was said: "The description of the ground is perfectly definite and certain. The only difficulty is that it was a wholly wrong description."

Here, in view of the allegations of the complaint, while the lien purports to state the name of the owner, the lien claim states the name of one not the owner, and thereby actually fails to state the name of the owner, or the person whose interest is sought to be charged.

Appellant contends that, because the complaint in intervention [4] states a cause of action in favor of the plaintiff in intervention against defendants, Umhang and Billings, on contract, the demurrer should not have been sustained. This might be true were plaintiff in intervention merely suing on such contract, or had he brought an independent action upon the lien, with demand for judgment for the amount due upon the contract. However, here it seeks relief in an action brought by another plaintiff. Unless plaintiff in intervention has an interest in the subject matter of the original action, it may not intervene. (Rev. Codes, sec. 6496.) Its right, if it existed at all, to intervene, was dependent upon the existence of a valid lien and the interest it thereby had in the subject matter of the action commenced by the plaintiff Interstate Lumber Company. A some-

what analogous situation existed in *Cook* v. *Gallatin R. Co., supra.* There the court said: "The alleged fact that they have a cause of action at law for a money judgment against the defendants, or one of them, is not of itself sufficient to warrant intervention in the suit of plaintiffs to foreclose a lien, however willing the plaintiffs may be to permit the interveners to come in. * * * Because the having of a right of action against a defendant (in a certain cause commenced by another) for the recovery of money merely, without a right of lien, is not ground or reason for intervention in a cause brought by another party against said defendant, we conclude that the demurrer as to each of the alleged causes of action should have been sustained." (See, also, *Moreland* v. *Monarch Min. & Mill. Co.*, 55 Mont. 419, 178 Pac. 175.)

The claim of lien not being sufficient to aid the allegations of the complaint, the court was not in error in sustaining the demurrer.

The judgment appealed from is therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, MATTHEWS and COOPER concur.

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

MARCH TERM, 1920.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. WILLIAM L. HOLLOWAY,
THE HON. JOHN HURLY,
THE HON. JOHN A. MATTHEWS,
THE HON. CHARLES H. COOPER,
} Associate Justices.

FERGUS COUNTY HARDWARE CO., RESPONDENT, *v.* CROWLEY, APPELLANT.

(No. 4,128.)

(Submitted February 25, 1920. Decided March 8, 1920.)

[188 Pac. 374.]

Statute of Frauds—Promise to Answer for Another's Debt—When Original Obligation—Sales—Delivery—Variance.

Statute of Frauds—Sales—Promise to Answer for Another's Debt—When Original Obligation.

1. Where defendant had instructed a merchant who had refused to extend credit to a third person to send the goods desired to such person with the assurance that he (defendant) would pay for them, and credit was extended solely to defendant, the obligation to pay for them was original and not affected by the statute of frauds.

On the question of contemporaneous promise of one person to pay where benefit inures to another as a promise to answer for the default of another within the statute of frauds, see notes in 15 L. R. A. (n. s.) 214; 32 L. R. A. (n. s.) 598.

Same—Extension of Credit to Promisor—Billing of Goods to and Partial Payment by Another—Effect.

2. The facts that the goods referred to above were charged to the person to whom they were sent and not to the defendant, that bills for them were rendered to the former and partial payments received from him, *held* not to have been conclusive against plaintiff, but subject to explanation on the question to whom credit was extended.

Sales—Delivery to Other Than Buyer—Variance.

3. Delivery of goods to one designated by the buyer is delivery to the buyer himself; hence there is no variance between an allegation of delivery of goods to the buyer and proof of delivery to one designated by him.

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

ACTION by the Fergus County Hardware Company against T. E. Crowley. From a judgment for plaintiff and an order denying a new trial, defendant appeals.

Affirmed.

Mr. E. K. Cheadle, for Appellant, submitted a brief and argued the cause orally.

Mr. S. P. Williams, for Respondent, submitted a brief; *Mr. Ralph J. Anderson,* of Counsel, argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The complaint in this action charges that between May 26 and October 30, 1913, plaintiff sold and delivered to the defendant at his special instance and request certain goods, wares and merchandise of the value of $515.77, no part of which sum has been paid except $100 in cash; that defendant is entitled to credit for the further sum of $64 for goods returned, and that there remains unpaid a balance of $351.77. The answer is a general denial. The trial of the cause resulted in a verdict for plaintiff, and from the judgment entered thereon and from an order denying a new trial, defendant appealed.

The evidence on behalf of the plaintiff is to the effect that [1] C. E. Pentecost, the son-in-law of the defendant, had

previously purchased goods from plaintiff upon credit; that he had failed to meet his obligations, and had executed and delivered to plaintiff certain worthless checks; that early in May, 1913, he was engaged upon work in the prosecution of which he required immediately certain goods (gasoline and oil), and ordered them from the plaintiff, but, because of the facts stated, they were not delivered, and plaintiff refused to sell to him further upon credit; that defendant came to plaintiff's place of business to inquire the reason the goods had not been delivered, and was informed; that thereupon he said, "Send this stuff out there, and I will pay for it"; that later Pentecost sent to plaintiff another order for goods, which plaintiff refused to fill until defendant could be notified, and, when notified, he said, "Get the stuff out there, whatever the boys want, and I will pay for it"; that the goods were shipped to Pentecost and charged upon plaintiff's books to Pentecost; that bills were sent to Pentecost, and that Pentecost paid $100 on account, but that credit was extended solely to defendant, Crowley.

It was peculiarly the province of the jury to pass upon the credibility of plaintiff's witnesses, and the general verdict is in effect a finding that their version of the transaction is the correct one. With these facts found, there cannot be any question that Crowley's obligation was an original one not affected by [2] the statute of frauds. While it will be conceded that the facts that the goods were charged to Pentecost, that bills for them were rendered to him and partial payment received from him, tend strongly to indicate that the sale was made to him, still neither any one of the facts is, nor all of them are, conclusive against the plaintiff. They may be explained, and if the jury was satisfied, as it apparently was, that the sale was made altogether upon the credit of Crowley without any intention of resorting to Pentecost for payment, the recovery is warranted. (25 R. C. L. 491, 492.) This entire subject has been covered so fully by this court in *McGowan Com. Co.* v. *Midland C. & L. Co.*, 41 Mont. 211, 108 Pac. 655, *Fortman* v. *Leggerini*, 51 Mont. 238, 152 Pac. 33, and *Breidenbach Bros.* v. *Upper Valley Or-*

chards Co., ante, p. 247, 187 Pac. 1006, that further citation of authorities is unnecessary.

It is contended that there is a fatal variance between the [3] pleadings and proof, in that the complaint alleges a delivery to Crowley, and the evidence discloses a delivery to Pentecost. The evidence, however, goes no further than to indicate that the goods were shipped to Pentecost by direction of defendant, and it is too well settled to be open to question that delivery of goods to one designated by the buyer to receive them is delivery to the buyer himself. (*Wing* v. *Clark*, 24 Me. 366; *Blumenthal* v. *Greenberg*, 130 Cal. 384, 62 Pac. 599; 35 Cyc. 189; 24 R. C. L. 40.)

No error appearing in the record, the judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

STATE EX REL. JACKSON, RELATOR, *v.* PORTER, STATE AUDITOR, RESPONDENT.

(No. 4,540.)

(Submitted January 12, 1920. Decided March 8, 1920.)

[188 Pac. 375.]

Office and Officers—District Judges—Salaries—Increase—Constitution.

Office and Officers—Salaries—Increase—Purpose of Constitutional Limitations.

1. The purpose of the constitutional limitations (Art. V, sec. 31, Art. VII, sec. 4, Art. VIII, sec. 29) against the passage of laws increasing (or diminishing) the salaries of certain public officers during the term for which they were elected, is to remove the temptation from the legislature to control the executive and judicial branches of government by promises of reward in the form of increased compensation (or threats of punishment by way of reduced salaries).

Same—Enforcement of Constitutional Limitations.

2. The rule established by the above constitutional limitations must be strictly enforced, provided the reason underlying it is present; whenever the reason for it ceases, so does the rule itself.

District Judges—Salaries—Who Entitled to Increase.

3. *Held*, that while under the constitutional limitations above (paragraph 1) a district judge elected prior to, and serving at the time of, the passage of an Act increasing the salary of the office, would not have been entitled to the increase, his successor appointed to fill the vacancy created by the former's resignation some seven months after its passage, could rightfully demand the enlarged compensation, the circumstances removing the case from the operation of the rule referred to in paragraph 1 above. (MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HURLY dissenting.)

PROCEEDING in *mandamus* by the State of Montana, on the relation of Joseph R. Jackson, to compel George Porter, State Auditor of the State of Montana, to allow a claim for salary presented. Peremptory writ ordered to issue.

Mr. W. A. Rotering, Mr. William Meyer and *Mr. Lester Loble*, for Relator, submitted a brief; *Mr. Rotering* argued the cause orally.

Mr. S. C. Ford, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, submitted a brief; *Mr. Woody* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

At the general election in November, 1916, John V. Dwyer was elected a district judge of the second judicial district of this state. He qualified and entered upon the discharge of his duties and continued therein until the sixth day of October, 1919, when he resigned. On October 9 the relator herein was appointed to fill the vacancy and duly qualified. In November, 1916, when Judge Dwyer was elected, and in January, 1917, when he entered upon the discharge of his duties, the salary of a district judge was $4,000 per year. In March, 1919, section 292, Revised Codes, was amended and the salary of a district judge increased from $4,000 to $4,800 per year. (Laws 1919, p. 337.) The relator having presented his claim for salary

under the amended statute, and the state auditor having refused to allow it to the extent of $120, this proceeding was instituted.

The state Constitution provides:

Section 31 (Article V): "Except as otherwise provided in this Constitution, no law shall extend the term of any public officer, or increase or diminish his salary or emolument after his election or appointment: Provided, that this shall not be construed to forbid the Legislative Assembly from fixing the salaries or emoluments of those officers first elected or appointed under this Constitution, where such salaries or emoluments are not fixed by this Constitution."

Section 4 (Article VII): "Until otherwise provided by law, the governor, secretary of state, state auditor, treasurer, attorney general and superintendent of public instruction, shall quarterly, as due, during their continuance in office, receive for their services compensation, which is fixed as follows: [Then follows the schedule of salaries.] * * * The compensation enumerated shall be in full for all services by said officers respectively rendered in any official capacity or employment whatever during their respective terms of office, and the salary of no official shall be increased during his term of office."

Section 29 (Article VIII): "The justices of the Supreme Court and the judges of the district courts shall each be paid quarterly by the state, a salary, which shall not be increased or diminished during the terms for which they shall have been respectively elected."

Is the relator entitled to the increased salary provided by the Act of March 7, 1919, or is he limited to the amount of salary provided by law at the time Judge Dwyer was elected and entered upon the discharge of his duties? A like question has been before the courts of several of the states, but the decisions are in hopeless conflict. In practically every case to which our attention has been directed, the decision is made to depend upon the peculiar phraseology of the constitutional provision under review, without reference to its history or purpose. If we were to pursue the same course, we would be confronted with one

rule declared for executive officers and an altogether different one for members of the judiciary. If section 4, Article VII, above, be construed literally, then it is within the power of the legislature to reduce the salary of the governor, secretary of state, auditor, treasurer, attorney general or superintendent of public instruction, after he has been elected and has assumed the duties of his office, and compel him to accept the reduced compensation (even though it be but nominal) during the remainder of his term, or resign, and if he resigned his successor would occupy no more advantageous position. In other words, under such a construction, the executive officers would be absolutely at the mercy of the legislature, but such a construction would be as ridiculous as it would be destructive of the very foundation of our form of government.

The government of the United States, and the government of [1, 2] every one of our states, has for its foundation principle the axiom of democracy that the powers of government in a republic can be exercised with security to the people only when apportioned among the three co-ordinate branches, which shall be, as nearly as may be, independent of each other. The disregard of this principle by monarchial governments of Europe had led to such excesses and abuses that, when the framers of our federal Constitution came to prepare the fundamental law for the guidance of this nation, they profited by experience and avoided those defects in other schemes of government, and our state constitutions have but followed in their wake. The discussion, in the Federalist, of the constitutional limitations upon the power of the congress over official salaries, and the further consideration of the subject by Chancellor Kent, disclose the contemporaneous judgment of the times. (1 Kent's Commentaries, p. 293; The Federalist, No. 79; 1 Scott's Federalist and Other Constitutional Papers, p. 431.) If the law-making power had the power to interfere *ad libitum* with the compensation of public officers, it could coerce action favorable to its own views by the promise of increased salary or the threat of violent reduction. Hamilton said in the Federalist: "A power over a

man's subsistence amounts to a power over his will." The provision in the federal Constitution and the corresponding provision in the several state constitutions all have the same history and the same purpose in view. The purpose is to secure, as far as possible, the independence of each co-ordinate branch of government, and to that end relieve the law-making branch from the importunities of office-holders who might seek increased compensation, not for the office, but for themselves, and what was of infinitely greater consequence, remove from the lawmakers the temptation to control the other branches of government by promises of reward in the form of increased compensation or threats of punishment by way of reduced salaries; or, stated differently, the sole purpose of the constitutional limitations is to remove from the sphere of temptation every public officer whose office is created by the Constitution and whose official conduct in the remotest degree might be influenced by the hope of reward or the fear of punishment. So far as there is reason for the rule which underlies the limitations, it must be enforced with the utmost rigor, but whenever the reason for the rule ceases, so does the rule itself.

In the absence of constitutional inhibition, there cannot be a question that the legislature could have increased judicial salaries and could have made the increase inure immediately to the benefit of every judge of the state; but because of the possibilities of the abuse of such power our Constitution wisely forbade that the increase should affect anyone whose official conduct under any circumstances might be influenced by the result. If Judge Dwyer had continued in office during the full term of four years for which he was elected, there is every reason why he should not have received the benefit of the increase in salary provided by the amended Act passed after he entered upon the discharge of the duties of his office. At the time the bill for the amended Act was before the legislature in March, 1919, it was impossible that any member could have known that Judge Dwyer would resign in October following and that Joseph R. Jackson would become his successor. No possible importunity

on the part of Mr. Jackson in March, 1919, could have influenced the enactment of the amended statute for his own benefit, and no legislative promises then made to Mr. Jackson could have tended to sway his judicial mind seven months later when for the first time he became clothed with judicial power and authority. The circumstances remove relator's case from the operation of the rule.

The amended Act became effective in March, 1919, and there is not any reason why Judge Jackson, who was not appointed until October following, should not receive the salary fixed by law at the time he entered upon the discharge of his duties. The three provisions of our Constitution quoted above are clothed in different language, but there is no magic in mere words. They mean the same thing, have the same history, and are intended to accomplish the same end.

No useful purpose could be served by a review of the decided cases. In our judgment, they do not touch the principle which underlies the constitutional limitations involved. They are cited for reference only. The leading cases which hold that the restriction does not apply in a case of this character are: *Gaines* v. *Horrigan,* 72 Tenn. (4 Lea) 608; *State* v. *Frear,* 138 Wis. 536, 16 Ann. Cas. 1019, 120 N. W. 216; *Board* v. *Lee,* 76 N. J. L. 327, 70 Atl. 925; *Carter* v. *State* (Okl.), 186 Pac. 464. *Contra: Larew* v. *Newman,* 81 Cal. 588, 23 Pac. 227; *Storke* v. *Goux,* 129 Cal. 526, 62 Pac. 68; *Harrison* v. *Colgan,* 148 Cal. 69, 82 Pac. 674; *Foreman* v. *People,* 209 Ill. 567, 71 N. E. 35; *Somers* v. *State,* 5 S. D. 584, 59 N. W. 962.

It is ordered, adjudged and decreed that a peremptory writ of mandate issue, directed to the state auditor, commanding him forthwith to issue to the relator a state warrant for the sum of $120.

Writ granted.

ASSOCIATE JUSTICES MATTHEWS and COOPER concur.

MR. JUSTICE HURLY: I dissent. I think that "term," as used in the Constitution, refers to the office and not to the incumbent. In support of this view, see *Larew* v. *Newman,* 81 Cal. 588, 23

Pac. 227; *Storke* v. *Goux*, 129 Cal. 526, 62 Pac. 68; *Harrison* v. *Colgan*, 148 Cal. 69, 82 Pac. 674; *Foreman* v. *People ex rel. McEwen*, 209 Ill. 567, 71 N. E. 35; *Somers* v. *State*, 5 S. D. 584, 59 N. W. 962; *Parmater* v. *State*, 102 Ind. 95, 3 N. E. 383.

In my view, also, section 34 of Article VIII of the Constitution, intends that one appointed or elected to a judicial office to fill a vacancy, holds, not a separate term, but only a portion of the term for which the person he succeeds was elected.

MR. CHIEF JUSTICE BRANTLY: I concur in the dissenting opinion of MR. JUSTICE HURLY.

STATE, RESPONDENT, *v.* SMITH, APPELLANT.

(No. 4,476.)

Submitted February 24, 1920. Decided March 8, 1920.)

[188 Pac. 644.]

Criminal Law — Sedition — Intent—Evidence—Cross-examination—Hearsay—Information— Election—Instructions — Settlement—Appeal and Error.

Criminal Law—Evidence—Cross-examination of Defendant—Waiver of Constitutional Privilege.

1. Where defendant in a criminal prosecution takes the stand as a witness in his own behalf, and testifies that he did not commit the crime imputed to him, he waives his constitutional privilege, and cannot refuse to testify to any facts which would be competent evidence in the case, if proved by other witnesses.

Same—Cross-examination of Defendant.

2. The general rule that cross-examination must be confined to matters about which the witness has been examined on his direct examination, or matters connected therewith directly or indirectly, *held* controlling where defendant offers himself as a witness, though a wide latitude in the examination is permissible.

Same—Party Cannot Make Out Case on Cross-examination.

3. Under pretense of cross-examination of a witness of his adversary, a party cannot make out his own case.

On the question of cross-examination of accused in criminal cases, under statutory limitations, see note in 15 L. R. A. 669.

Sedition—Cross-examination of Defendant—Impeachment—When Error.

4. Where, after defendant, charged with sedition, had testified in his own behalf simply denying that he made the utterances testified to by the state's witnesses, the county attorney cross-examined him, in the manner of laying the foundation for impeachment, as to other seditious language not charged in the information nor inquired into in the state's case in chief, he made him his own witness and was bound by his answers, and in thereafter permitting him to be impeached the court committed error.

Same—Intent.

5. *Held*, that while intent is not specifically made an element of the crime of sedition as defined by Chapter 11, Laws Ex. Sess. 1918, the legislature inferentially made it such by the use of the word "calculated" when it made language "calculated to incite or influence resistance" to constituted authority a public offense.

Same—Effect of Seditious Utterances—Jury Question.

6. The question whether the natural tendency and reasonably probable effect of alleged seditious utterances was to incite or inflame resistance to duly constituted federal or state authority in connection with the prosecution of the war, was a question for the jury, and failure to so charge was error.

Same—Rules in Libel Cases not Applicable.

7. Though based upon utterances, as are libel cases, the crime of sedition is not governed by the rules in such cases, in which the jury is the judge of both the law and the fact.

Same—Instructions—Settlement—Failure to Make Objections—Effect.

8. Where counsel for defendant on the settlement of the instructions made no objection to those proposed to be given, he adopted the theory of the court, and could not thereafter put it in error by showing that certain of the instructions were erroneous, or by charging improper refusal to give others on an opposite theory.

Same—Instructions—Proper Refusal.

9. On a trial for sedition, an instruction that in order to convict the jury must find that the utterances proved were seditious was properly refused.

Same—Hearsay Testimony.

10. The testimony of a witness, fixing a date by means of an entry made by his wife in a diary kept by her, was hearsay and incompetent.

Same—Information—Separate Offenses.

11. Alleged seditious utterances, if spoken at one time and place, may constitute a single offense, but where spoken at different times and places and made to different persons each utterance, if it constitutes the crime of sedition, is a separate offense.

Same—Information—Election—Appeal and Error.

12. Where defendant charged with sedition made no motion to compel the state to make an election between a number of offenses charged in the information, and did not seek to have any of the charges withdrawn from consideration, he could not on appeal raise the question whether proof of one offense as to which witnesses were introduced constituted an election.

Appeal from District Court, Custer County; A. C. Spencer, Judge.

W. K. SMITH was convicted of sedition, and appeals from the judgment and from an order denying a new trial. Reversed and remanded.

Mr. Sharpless Walker and *Mr. W. C. Packer*, for Appellant, submitted a brief; *Mr. Walker* argued the cause orally.

A witness cannot be cross-examined upon collateral matters merely for the purpose of contradicting him. The statute prescribes the methods whereby a witness may be impeached, and he cannot be discredited by testimony of the character offered by the state in this case; nor is it permissible to question the defendant for the purpose of degrading him before the jury. The accused cannot be cross-examined as to a matter that is neither a fact in issue nor relevant to a fact in issue. The defendant in a criminal case, when he offers himself as a witness in his own behalf, is placed in the same position as any other witness and the same rule obtains as to his cross-examination, which must be confined to the matters about which he had been examined in chief; and any infringement of that rule is a violation of the defendant's constitutional right that he shall not be compelled to testify against himself. (*State* v. *Inich*, 55 Mont. 1, 11, 13, 173 Pac. 230; *People* v. *Schmitz*, 7 Cal. App. 330, 15 L. R. A. (n. s.) 717, 94 Pac. 407; *People* v. *Leonardo*, 199 N. Y. 432, 92 N. E. 1060; *McKeone* v. *People*, 6 Colo. 346; *State* v. *Brown*, 3 Boyce (Del.), 499, 85 Atl. 797; *State* v. *Zimmerman*, 3 Kan. App. 172, 42 Pac. 828; *Hayden* v. *Commonwealth*, 140 Ky. 634, 131 S. W. 521; *Commonwealth* v. *Jackson*, 132 Mass. 16; *State* v. *Carson*, 66 Me. 116; *Ferguson* v. *State*, 72 Neb. 350, 100 N. W. 800; *Hager* v. *State*, 10 Okl. Cr. 9, 133 Pac. 263; *State* v. *La Mont*, 23 S. D. 174, 120 N. W. 1104; *State* v. *Shockley*, 29 Utah, 25, 110 Am. St. Rep. 639, 80 Pac. 865; Greenleaf on Evidence, sec. 449; Thompson on Trials, sec. 461; Underhill on Criminal Evidence, sec. 62; Wigmore on Evidence, secs. 983, 984.)

It is a well-established rule of evidence, universal in its application to the trial of criminal cases, that where the prosecuting

attorney cross-examines the defendant, or one of the witnesses for the defense, as to a distinct collateral and immaterial fact, not brought out on the examination in chief, the answer of the witness is conclusive against the questioner and cannot be subsequently contradicted by way of impeachment. The prosecuting attorney has for the time being, as to such new and collateral matter, made the accused or witness for the defense a witness for the state, and is bound by the testimony; and where incompetent and improper evidence has been admitted in rebuttal of such testimony, over objection and exception, to the substantial prejudice of the defendant, appellate courts have invariably held it to be reversible error. (*State* v. *Jones*, 51 Mont. 390, 153 Pac. 282; *Bullard* v. *United States*, 245 Fed. 837, 158 C. C. A. 177; *People* v. *McKellar*, 53 Cal. 65; *People* v. *DeGarmo*, 179 N. Y. 130, 71 N. E. 736; *People* v. *Ware*, 29 Hun (N. Y.), 473, 1 N. Y. Crim. Rep. 166; *People* v. *Newman*, 261 Ill. 11, 103 N. E. 589; *Barton* v. *State*, 154 Ind. 670, 57 N. E. 515; *State* v. *Zimmerman*, 3 Kan. App. 172, 42 Pac. 828; *Commonwealth* v. *Smith*, 162 Mass. 508, 39 N. E. 111; *State* v. *Kasper*, 140 Minn. 259, 167 N. W. 1035; *State* v. *Valle*, 196 Mo. 29, 93 S. W. 1115; *Nickolizack* v. *State*, 75 Neb. 27, 105 N. W. 895; *Bullock* v. *State*, 65 N. J. L. 557, 86 Am. St. Rep. 668, 47 Atl. 62; *Willis* v. *State*, 13 Okl. Cr. 700, 167 Pac. 333; *Hester* v. *Commonwealth*, 85 Pa. St. 139, 157; *Parker* v. *State*, 46 Tex. Cr. 461, 108 Am. St. Rep. 1021, 3 Ann. Cas. 893, 80 S. W. 1008; *State* v. *Coyle*, 41 Utah, 320, 126 Pac. 305; Wharton on Criminal Evidence, sec. 484.)

Evidence of other offenses is not admissible unless it comes within one of the well-defined exceptions to the general rule of exclusion, such as to show intent, motive, absence of accident or mistake, identity of the person on trial, or a common scheme, plan or system embracing the commission of two or more crimes so interwoven that proof of one tends to prove the other. Neither intent nor state of mind is a necessary element of the crime of sedition requiring independent proof. The essential thing is that statements of the character mentioned in the statute have

the result or be calculated to have the result therein specified. The state's testimony as to other offenses in its case in chief, or on cross-examination, or in rebuttal, was incompetent, and it was clearly prejudicial. (*State* v. *Hill*, 46 Mont. 24, 126 Pac. 41; *State* v. *Jones*, 51 Mont. 390, 153 Pac. 282; *Boyd* v. *United States*, 142 U. S. 450, 35 L. Ed. 1077, 12 Sup. Ct. Rep. 292 [see, also, Rose's U. S. Notes]; *People* v. *King*, 23 Cal. App. 259, 137 Pac. 1076; *People* v. *Molineux*, 168 N. Y. 264, 62 L. R. A. 193, 61 N. E. 286; *State* v. *Brown*, 3 Boyce (Del.), 499, 85 Atl. 797; *Bishop* v. *People*, 194 Ill. 365, 62 N. E. 785; *State* v. *Berger*, 121 Iowa, 581, 96 N. W. 1094; *State* v. *Fournier*, 108 Minn. 402, 122 N. W. 329; *People* v. *Lapidus*, 167 Mich. 53, 132 N. W. 470; *Smith* v. *State*, 17 Neb. 358, 22 N. W. 780, 5 Am. Cr. Rep. 363; *Smith* v. *State*, 5 Okl. Cr. 67, 113 Pac. 204; *State* v. *Rader*, 62 Or. 37, 124 Pac. 195; *State* v. *Fulwider*, 28 S. D. 622, 134 N. W. 807; *Swan* v. *Commonwealth*, 104 Pa. St. 218, 4 Am. Cr. Rep. 188; *State* v. *Kelley*, 65 Vt. 531, 36 Am. St. Rep. 884, 27 Atl. 203, 9 Am. Cr. Rep. 354; *State* v. *Smith*, 103 Wash. 267, 174 Pac. 9; Jones on Evidence, sec. 143; Wigmore on Evidence, secs. 300, 349; 8 R. C. L., secs. 200, 201.)

Hearsay evidence, not part of the *res gestae*, nor dying declarations, is inadmissible in a criminal case to prove any fact except such matters as name, age, pedigree, general reputation or statements of accused. It is incompetent and inadmissible as proof of any material fact which can be established by witnesses who can testify of their own knowledge; and the refusal of the court to exclude, on motion of defendant, the testimony of a state's witness as to the date of the alleged seditious utterances of the defendant, where the witness was relying entirely upon his wife's memorandum, not made in his presence, was prejudicial error. That hearsay testimony of this character is incompetent is a fundamental rule of evidence, and while citation of authorities is unnecessary, the following are referred to: *State* v. *Reed*, 53 Mont. 292–298, Ann. Cas. 1917E, 783, 163 Pac. 477; *People* v. *Frey*, 165 Cal. 140, 131 Pac. 127; *People* v. *Kinney*, 202 N. Y. 389, 95 N. E. 756; *State* v. *Beeson*, 155 Iowa, 355,

Ann. Cas. 1914D, 1275, 136 N. W. 317; *Bradshaw* v. *Commonwealth*, 73 Ky. (10 Bush) 576; *Brown* v. *People*, 17 Mich. 429, 97 Am. Dec. 195; *Commonwealth* v. *Ricker*, 131 Mass. 581; *State* v. *Goddard*, 162 Mo. 198, 62 S. W. 697; *Donner* v. *State*, 69 Neb. 56, 95 N. W. 40; *McRae* v. *State*, 8 Okl. Cr. 483, 129 Pac. 71; *State* v. *Shaw*, 75 Wash. 326, 135 Pac. 20; *Runge* v. *State*, 160 Wis. 8, 150 N. W. 977; 6 Ency. of Evidence, p. 443.

Conceding that the court had the right to advise the jury as to the law, the jury still has the power and the lawful right to decide according to their understanding, conscience and judgment, questions compounded of law and fact involved in all criminal cases, including a case where the charge is sedition, which is akin to or a species of libel. The issue whether the words attributed to the defendant were seditious was not submitted to the jury for its decision and verdict, as required by the Constitution and laws, and the verdict of conviction should be set aside. (*State* v. *Sloan*, 35 Mont. 367–371, 89 Pac. 829; *United States* v. *Hodges*, 2 Wheeler's Crim. Cas. 477–485, Fed. Cas. No. 15,374; *People* v. *Seeley*, 139 Cal. 118, 72 Pac. 834; *People* v. *Sherlock*, 56 App. Div. 422, 68 N. Y. Supp. 74, 15 N. Y. Cr. Rep. 297; *Robinson* v. *State*, 33 Ark. 180; *State* v. *Heacock*, 106 Iowa, 191, 76 N. W. 654; *State* v. *Verry*, 36 Kan. 416, 13 Pac. 838; *State* v. *Drummond*, 132 La. 749, 61 South. 778; *Commonwealth* v. *Worcester etc. Corp.*, 3 Pick. (Mass.) 327; *State* v. *Powell*, 66 Mo. App. 598; *Coleman* v. *State*, 6 Okl. Cr. 252, 118 Pac. 594; *Kane* v. *Commonwealth*, 89 Pa. St. 522, 33 Am. Rep. 787.)

The Sedition Act went into effect "from and after" its passage and approval on February 22, 1918. A criminal statute cannot operate retroactively. The prosecution did not attempt to prove the hour and minute on the twenty-second day of February when the law was approved; and in the absence of such precise proof, the whole of that day should be excluded in computing the point of time when the law went into effect. (*United States* v. *Jackson*, 143 Fed. 783, 75 C. C. A. 41; *People* v. Nye, 9 Cal. App. 148, 98 Pac. 241; *United States* v. *McPhee*,

51 Colo. 425, 118 Pac. 996; *Schilling* v. *State*, 116 Ind. 200, 18 N. E. 682; *Arnold* v. *Board of Supervisors*, 151 Iowa, 155, 130 N. W. 816; *Bemis* v. *Leonard*, 118 Mass. 502, 19 Am. Rep. 470; *Murphy* v. *Commonwealth*, 172 Mass. 264, 70 Am. St. Rep. 266, 43 L. R. A. 154, 52 N. E. 505; *Budds* v. *Frey*, 104 Minn. 481, 15 Ann. Cas. 24, 117 N. W. 158; *State* v. *McCance* (Mo.), 19 S. W. 648; *State* v. *O'Brien*, 47 Ohio St. 464, 25 N. E. 121; 6 Am. & Eng. Ency. of Law, 2d ed., p. 939.)

Mr. S. C. Ford, Attorney General, and *Mr. Otto A. Gerth*, Assistant Attorney General, for the State, submitted a brief; *Mr. Gerth* and *Mr. Frank Hunter*, County Attorney of Custer County, argued the cause orally.

We cite the following authorities in support of our contention that the cross-examination of the defendant in this case was proper: *Cobban* v. *Hecklen*, 27 Mont. 245, 263, 70 Pac. 805, 811. In this case this court had occasion to consider section 8021, Revised Codes, and it is said in substance that this section changed the common-law rule in respect to cross-examination. It was further said that the right of cross-examination must be freely exercised, and, regarding the limits to which cross-examination may go, ought usually, if not always, to be resolved against an objection. (See, also, *State* v. *Howard*, 30 Mont. 518, 527, 77 Pac. 54; 5 Jones on Evidence, secs. 835, 836; *State* v. *Duncan*, 7 Wash. 336, 38 Am. St. Rep. 888, 35 Pac. 117.)

The evidence which was brought out on cross-examination of the defendant in addition to proving the issues was also competent for the purpose of impeaching the defendant as a witness. (Rev. Codes, sec. 8025; 5 Jones on Evidence, secs. 826, 827, 845, 848.)

The contention is made that the sedition law was approved on February 22, 1918; that some of the testimony as to seditious remarks indicated that such remarks were made on that day. It is argued that because the prosecution did not show the exact moment that the law was approved, all of the twenty-second day of February would be excluded, and consequently, the law would be considered as taking effect on February 23.

The appellant upon this contention is not borne out by the authorities, but states a rule opposed to the universal current of authority. In 25 R. C. L., page 797, section 45, the rule is stated as follows: "In the absence of evidence showing at what hour of the day an Act was approved by the chief executive, it is presumed to have been approved on the first minute of that day." Upon the same point here involved we cite the case of *Lloyd* v. *North Carolina Ry. Co.*, 151 N. C. 536, 45 L. R. A. (n. s.) 378, 66 S. E. 604; *United States* v. *Norton*, 97 U. S. 164, 24 L. Ed. 907; *Lapeyre* v. *United States*, 17 Wall. (U. S.) 191, 21 L. Ed. 606; *Arnold* v. *United States*, 9 Cranch (U. S.), 104, 3 L. Ed. 671; *Louisville* v. *Portsmouth Sav. Bank*, 104 U. S. 469, 26 L. Ed. 775 [see, also, Rose's U. S. Notes].

Appellant contends that the information in the case attempted to charge five different crimes. He then argues that at the trial the prosecution having failed to elect which particular offense it was to rely upon for a conviction, the first evidence which tended to prove any offense under the information operated as an election. It is then asserted that the first evidence having failed to prove any offense whatever, the whole prosecution fails. It is not true in a case of sedition that the first evidence of a particular act is an election of such act upon which the state will rely for a conviction, where a number of acts have been charged against a defendant. The defendant himself must move the court to compel an election as to which particular offense the prosecution will stand on. In this case, however, we have another proposition which the appellant fails to take into consideration. In the case of *State* v. *Wyman*, 56 Mont. 600, 186 Pac. 1, it is said in substance that the Sedition Act defines but one crime, which may be committed in various ways or by a series of conduct or statements. It is further held by this court in the case cited that a series of transactions taken together will complete the offense of sedition, but that any one of the statements might be proved which will also complete the offense.

If the information, as appellant contends, contains but one offense occurring at one time and place, the state does not have

to elect which particular statement they are going to rely upon. If the defendant made a number of statements at one time and place as the information indicates, the state could prove any one of such statements or all of them together, and thereby establish but one offense. On the other hand, if the information contains a number of statements charged against the defendant, as it does, and at the trial if the state should be unsuccessful in proving one of such statements charged, it might undertake to prove any one of the others, or all of the others, and still be within its rights. The rule announced in the case of *State* v. *Gaimos*, 53 Mont. 118, 162 Pac. 596, does not apply.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

Appellant was convicted, in the district court of Custer county of the crime of sedition, sentenced to imprisonment for a term not less than ten nor more than twenty years, and to pay a fine of $20,000, and appeals from the judgment and from the order of the court denying his motion for a new trial.

The information charges six alleged seditious utterances, in the conjunctive and in a single count, and fixes the time as "on or about the eighth day of June, 1918." It will be recalled that the Sedition Act (Acts Ex. Sess. 1918, Chap. 11) became effective, by the signature of the governor, on February 22, 1918.

The first witness for the state, Ralph D. Rhea, testified to the making of the second seditious declaration by the defendant on the twenty-third day of February, 1918. On cross-examination he admitted that the only means he had of fixing the date was by an entry made by his wife in a diary kept by her, as to the date he returned from a certain trip, the statement having been made on the day he so returned; that he kept no track of dates. The wife was not called as a witness.

The second witness, one Robert Fauver, testified to the first alleged seditious utterance, and fixed the date thereof as February 18, 1918. He further testified as to the making of the

fourth seditious statement by the defendant, in the month of May, 1918, in the presence of himself, his wife, defendant's wife, and a young boy. No other witness was produced as to this occurrence, though it appears that Fauver's wife was present at the trial. The only other witness called on the state's case in chief testified as to a statement by defendant, in its nature seditious, but not included in the charge in the information. Whereupon the state rested its case.

No motion to compel an election by the state was made, though the evidence disclosed that the statements testified to were made at different times and places and to different persons.

The defense thereupon introduced six witnesses who testified that the reputation of the witness Fauver for truth, honesty and integrity was bad, and one witness who testified that he had, at another time, made statements contradictory of his testimony on the stand. Thereupon the defendant was placed on the stand, and denied categorically each of the statements made by the witnesses for the state, but went no further, and was then turned over to the county attorney for cross-examination. Over the objection of counsel for the defense, he was interrogated at length, in the manner of laying the foundation for impeachment, as to a large number of seditious utterances, both contained in and aside from the allegations of the information, but in no wise connected with the matter brought out in the state's case in chief or with his testimony on direct examination, and denied the making of any one of them. The wife of the witness Fauver was then placed on the stand, and over the objection of counsel permitted to relate the statement as testified to by Fauver and denied by appellant.

1. The first question raised by appellant's counsel is as to [1] the right of the county attorney to cross-examine appellant on matters not brought out on his direct examination, and refers to those questions propounded regarding other alleged seditious utterances, not contained in the charge in the information nor inquired into in the state's case.

The respondent contends that proof of such utterances was competent as a part of the state's case, for the purpose of showing intent or motive; as corroboration of the testimony concerning the crime charged; to show that the acts complained of were a part of a chain or system of crime, or to negative the idea that the particular offense charged was the result of mere accident or mistake or the use of mere loose words or phrases, under the authority of *State* v. *Wyman*, 56 Mont. 600, 186 Pac. 1, and that, if relevant as a part of the state's case, such matter was a proper subject of cross-examination, citing 5 Jones on Evidence, section 827, which reads as follows: "The test for determining whether a matter is relevant has often been laid down: Would the cross-examining party be entitled to prove it as a part of his case to establish his complaint or answer?"

Section 18, Article III, of our Constitution, provides that "no person shall be compelled to testify against himself, in a criminal proceeding." Section 9484 of the Revised Codes adds to this constitutional provision the following: "But he may be sworn and may testify in his own behalf." Under the Constitution and under the statute, the accused cannot be compelled to take the witness-stand, "but if he puts himself on the stand as a witness in his own behalf, and testifies that he did not commit the crime imputed to him, he thereby waives his constitutional privilege, and renders himself liable to be cross-examined upon all facts relevant and material to that issue, and cannot refuse to testify to any facts which would be competent evidence in the case, if proved by other witnesses." (*Commonwealth* v. *Nichols*, 114 Mass. 285, 19 Am. Rep. 346; *Commonwealth* v. *Lannan*, 13 Allen (Mass.), 563; *Commonwealth* v. *Mullen*, 97 Mass. 545; *State* v. *Wells*, 54 Kan. 161, 37 Pac. 1005; *State* v. *Wentworth*, 65 Me. 234, 20 Am. Rep. 688; *State* v. *Duncan*, 7 Wash. 336, 38 Am. St. Rep. 888, 35 Pac. 117; *State* v. *Rodgers*, 40 Mont. 248, 106 Pac. 3.)

The general rule is that cross-examination must be confined to [2] the matters about which the witness has been examined on his direct examination, or matter connected therewith, either

directly or indirectly. (*Shandy* v. *McDonald,* 38 Mont. 393, 100 Pac. 203.) /The general rule is perhaps modified to this extent: That "when an accused becomes a witness in his own behalf, and denies that he committed the crime for which he is on trial, a wide latitude of cross-examination is permissible, owing to the general nature of the defendant's statements. Upon the cross-examination of such witness such deflections from the matter brought out on direct examination are allowed as may be necessary to bring the whole matter involved in the direct examination before the court, and to extract the whole of the truth concerning the matter brought forward by the accused." (*State* v. *Rogers,* 31 Mont. 1, 77 Pac. 293; *State* v. *Rodgers, supra.*) And in the case of *State* v. *Howard,* 30 Mont. 518, 77 Pac. 50, this court said: "The right of cross-examination extends, not only to all facts stated by the witness in his original examination, but to all other facts connected with them, whether directly or indirectly, which tend to enlighten the jury upon the question in controversy, and this right should not be restricted unduly."

/However, though a wide latitude is allowed in the cross-examination of a defendant thus offering himself as a witness, the rules governing cross-examination must still control. Thus in the *Rogers Case,* 31 Mont. 1, 77 Pac. 293, the defendant was on trial for burglary; his brother was on the stand, and was asked as to whether he and the defendant had not gone on a certain trip for the purpose of committing robbery. The court said: "The questions, therefore, would convey the impression to the jury that the state's counsel had reason to believe that the defendant went to Cable for the purpose of committing a robbery. The fact that it was not intended to prejudice the defendant, or that the questions only accused the defendant of the intent to commit a crime, or that the negative answers of the witness were conclusive upon the state, could not free the questions of their objectionable character. It was certainly not to be expected that they would be answered in the affirmative."

The propounding of the questions was held to be reversible error.

But the respondent urges that if not proper for that purpose, the questions were proper for the purpose of impeachment. This is the same contention that was made in the case of *State* v. *Kanakaris*, 54 Mont. 180, 169 Pac. 42, and was disposed of by this court in the following language: "Upon the cross-examination of the defendant he was asked many questions by the county attorney, the purpose of which was to show that he had been guilty of numerous minor offenses, independent of the crime for which he was being tried. The attorney could have had no other object in view than to impeach the defendant or degrade him in the estimation of the jury, and for either purpose the questions are forbidden by statute." (Secs. 8024, 8031, Rev. Codes.) "A witness, whether the accused or any other witness, may be discredited in any of the various ways named in the statute or sanctioned by law." (*State* v. *Rogers, supra.*)

The nearest approach, "under the statute, or sanctioned by law," to the method of attempted impeachment employed by counsel in this instance is found in section 8025 of the Revised Codes, providing that "a witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony." While under this section a different rule applies to the accused than to other witnesses (*State* v. *Burrell*, 27 Mont. 282, 70 Pac. 982), it is immaterial here, as counsel followed the statute. However, the provisions of the statute relate only to those statements "*inconsistent with his present tesimony,*" and it must be remembered that appellant had gone no further than to deny the particular utterances attributed to him by the few witnesses for the state; he did not declare his loyalty nor affirm that he had never made a seditious statement. Under these circumstances, had the questions been propounded to any other witness for the defense than the accused himself, they would have been improper.

Under the pretense of cross-examining a witness, one party to
[3] an action cannot make out his case by witnesses for the

other side. (*Shandy* v. *McDonald, supra; Davis* v. *Morgan*, 19 Mont. 141, 47 Pac. 793; *Brophy* v. *Downey*, 26 Mont. 252, 67 Pac. 312; *Du Vivier* v. *Phillips*, 18 Mont. 370, 45 Pac. 554.)

Section 8021, Revised Codes, provides: "The opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith, and in so doing may put leading questions, *but* if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination." In other words, by examining an adverse witness on matters other than facts stated in his direct examination or [4] connected therewith, the examiner makes the witness his own. Here the county attorney made the defendant his own witness to prove facts not touched upon in his case in chief, nor in the direct testimony of the witness. Having done so, he was bound by the answers of the witness, and the answer that the witness did not make the statement recited to him should have ended the matter. (*Bullard* v. *United States*, 245 Fed. 837, 158 C. C. A. 177; *State* v. *Zimmerman*, 3 Kan. App. 172, 42 Pac. 828; *People* v. *Schmitz*, 7 Cal. App. 330, 15 L. R. A. (n. s.) 717, 94 Pac. 407, 419; *People* v. *Rodriguez*, 134 Cal. 140, 66 Pac. 174; *George* v. *State*, 16 Neb. 318, 20 N. W. 311; *Bullock* v. *State*, 65 N. J. L. 557, 86 Am. St. Rep. 668, 47 Atl. 62; *State* v. *Coyle*, 41 Utah, 320, 126 Pac. 305.)

In *People* v. *Schmitz, supra*, the court said: "The cross-examination being erroneous, the error was not cured by the witness answering the question in the negative, for the reason that the prosecution subsequently used this examination of the defendant as a basis for introducing certain evidence of Ruef, which properly was a part of the case of the people in chief. (*People* v. *Morton*, 139 Cal. 727, 73 Pac. 609.) Negative answers were perhaps what the prosecution expected, so that under the guise of rebuttal they could call Ruef to the stand to contradict the defendant, and that is what was done. It is evident that by the rules of law, and that regard to fairness which characterizes every criminal trial, if the prosecution had evidence to prove that defendant took or accepted part of the money extorted by

the conspiracy and paid to his accomplice, Ruef, such evidence should have been produced as a part of the case for the prosecution. The defendant had the right to hear the evidence against him before being required to meet it. The evidence, and all the evidence, tending to show his guilt should have been produced. If Ruef paid or gave defendant money, part of the proceeds of the crime, the prosecution should have produced the evidence as a part of its case. The defendant would then have had the right to meet the evidence as part of his defense. In this case Ruef was not placed upon the witness-stand, nor was any evidence given as to any money being paid to defendant; but the evidence was held back until the defendant was asked the questions in cross-examination. Then, in the guise of rebuttal, the evidence of Ruef was brought forth, under the claim that it was to contradict the defendant, but really for the purpose of proving facts which were part of the case for the prosecution in the first instance. Such practice would be a great injustice to a defendant. It would be contrary to the way criminal trials are usually conducted in our courts. It would be contrary to every man's sense of right and justice. It is of much more importance that every defendant should have a fair and impartial trial under the rules of evidence laid down by the ablest judges and established by centuries of experience than that a defendant in some particular case should be convicted."

In *People* v. *Rodriguez, supra,* the court said: " 'If a question is put to a witness which is collateral and irrelevant to the issue, his answer cannot be contradicted by the party who asked the question, but is conclusive against him.' (*People* v. *McKeller,* 53 Cal. 65; 1 Greenleaf on Ev., sec. 449.) The testimony of the sheriff contradicting the appellant on the collateral and irrelevant matter was therefore clearly inadmissible; and it would be idle to say that it could not have been prejudicial to appellant. In the first place, it tended to 'discredit his testimony,' and, in the second place, it tended to prove the commission of another and independent crime, which, of course, was entirely unwarranted."

In *People* v. *De Garmo*, 179 N. Y. 130, 71 N. E. 736, the court said: "A more serious question is raised by the exceptions to the admission of certain evidence that is claimed to have been not only incompetent, but seriously and substantially prejudicial to the defendant. The defendant was a witness in his own behalf. Upon his direct examination he testified as to the occasion mentioned in the indictment, and nothing else. On his cross-examination he was interrogated as to a number of alleged occurrences which had no legal connection with the homicide, and his testimony thus elicited was then permitted to be contradicted by witnesses called in rebuttal for the prosecution. * * * At this point we encounter one of the limitations of the rule governing the impeachment of witnesses that was lost sight of in the case at bar. When the credibility of the defendant as a witness was assailed by compelling him upon his cross-examination to give testimony which, although competent for purposes of impeachment, was collateral to the main issue, the prosecution, at whose instance the collateral evidence was elicited, was bound thereby, and had no right to contradict it. This is an inflexible limitation of the rule referred to, and illustrations thereof are to be found in *Lawrence* v. *Barker*, 5 Wend. (N. Y.) 301; *Howard* v. *City Fire Ins. Co.*, 4 Denio (N. Y.), 502; *Stokes* v. *People*, 53 N. Y. 164, 13 Am. Rep. 492; *People* v. *Greenwall*, 108 N. Y. 296, 2 Am. St. Rep. 415, 15 N. E. 404; *People* v. *Ware*, 29 Hun (N. Y.), 473, affirmed 92 N. Y. 653. * * * The admission of such evidence raises a conclusive presumption of injury to the defendant, and renders the reversal of the judgment herein an imperative necessity."

If counsel for the state desired to prove other acts of a similar character, in corroboration, he should have introduced that evidence in his case in chief. The evidence, and all the evidence tending to show the guilt of the defendant, should have been produced, so that, in all fairness, the defendant be given the opportunity to meet that evidence as a part of his defense. Having failed to do so, and having, for the time being, made the defendant his own witness, he was bound by the answer given,

and it was error for the trial court to thereafter permit him to be impeached upon such testimony. (*Willis* v. *State*, 13 Okl. Cr. 700, 167 Pac. 333; *Wilson* v. *State*, 37 Tex. Cr. 64, 38 S. W. 610; *State* v. *Dunn*, 53 Or. 304, 99 Pac. 278, 100 Pac. 258.) And the defendant could not thereafter be impeached by other witnesses who might testify that he made the statements attributed to him.

2. Another question is raised by appellant's contention that [5] proof of other utterances of a seditious nature was not admissible, as the element of intent was not included in the crime of sedition as defined in the statute, citing *State* v. *Kahn*, 56 Mont. 108, 182 Pac. 107, as so holding. While the question is not properly before us, as such testimony was not introduced as a part of the state's case, we deem it advisable, in the light of the fact that this case must be retried, to dispose of it here.

A careful reading of the *Kahn Case* will disclose that the court did not go as far as counsel contends it did. While it is true that, as stated by counsel, the court there said: "It is elementary that for the preservation of the peace, the safety of the people, and the good order of society, the legislature may prohibit certain acts, and attach a penalty for disobedience, without including any evil intent as an ingredient of the offense other than the general intent implied from a violation of the statute"—it in the same paragraph continued: "But the provision of the statute is, 'shall utter language calculated to incite or inflame resistance,' *etc.* Primarily the word 'calculate' means to compute mathematically, and it implies power to think, to reason, to plan. In its broader significance *it means to intend*, to purpose, to design. (Century Dictionary; Standard Dictionary.)"

3. Under subdivisions 2 and 3 of section 1 of the Sedition Act, [6] that the utterance complained of was "calculated" to produce the effect set out in the statute is a necessary ingredient of the crime, and the question as to "whether the natural tendency and reasonably probable effect of the language was to incite or inflame resistance to duly constituted federal or state authority in connection with the prosecution of the war" was a question

for the jury, and the jury should have been so advised by the instructions. (*State* v. *Kahn, supra.*)

However, counsel for the defense is in error in contending that, [7] because based upon utterances, the crime of sedition is to be governed by the rules in libel cases, where, under the Constitution, the jury is the judge of both the law and the fact. In the *Kahn Case* above, this court has indicated that such contention is without merit. It there said: "Sedition was a crime unknown to the common law; the nearest approach to it was libel of the Constitution or government, but that offense has never been recognized by the states of this Union. Sedition is a purely statutory offense, and our Act is declared to be, and is in fact, a general police regulation."

Our Sedition Act (Chap. 11, Laws Ex. Sess. 1918) defines a public offense as any other public offense is defined in our Penal Code, and a prosecution thereunder is identical with any other prosecution under a penal statute; and the rule herein announced, following that in the *Kahn Case*, goes no further than the rule applied generally in criminal cases, whenever applicable. Thus in a grand larceny case, the jury must be instructed that they must find beyond a reasonable doubt, not only that the accused committed the act, but also that he did so "with the intent to deprive or defraud the true owner of his property," *etc.* [8] However, appellant's counsel, on the settlement of the instructions, made no objection to those proposed to be given, and thus adopted the theory of the court, and cannot thereafter put the court in error, either by a showing that certain of the instructions were erroneous, or by the refusal to give other offered instructions on an opposite theory. (Sec. 9271, subd. 4, Rev. Codes; *State* v. *Brodock*, 53 Mont. 463, 164 Pac. 658.)

4. The offered instructions by the defense, attempting to advise [9] the jury that they must, in order to convict, find that the utterances were seditious, were clearly erroneous and properly refused. As to that portion of defendant's offered instructions Nos. 1 and 5, advising the jurors that they could not find the defendant guilty unless they found beyond a reasonable doubt

that the defendant, since the twenty-second day of February, 1918, made the utterances, the offered instructions were properly refused, as covered by the court's instruction No. 2, advising the jurors that the crime was complete if they found beyond a reasonable doubt that "at any time subsequent to February 22, 1918," *etc.*

5. The testimony of the witness Rhea, fixing the date of the [10] alleged offense by means of what he saw in his wife's diary, was, as to the date, hearsay, and should have been stricken on motion. It was competent for the witness to testify as to the time, with reference to his return from the trip mentioned, but if, as he stated, he had no independent knowledge of the date of his return, the date should have been fixed by the testimony of the wife or some other witness than Rhea.

6. Appellant contends that, as the proof disclosed that the charge in the information contained more than one alleged offense, the proof of the first offense as to which witnesses were introduced was, in effect, an election on the part of the state; while the respondent urges that, under the decision in *State* v. *Wyman,* 56 Mont. 600, 186 Pac. 1, there was but one offense charged, and consequently no call for an election.

It is true that, in the *Wyman Case,* it was held that the information may contain numerous allegations which, if taken [11] singly, would constitute as many offenses under the Sedition Act, but that, when alleged collectively, they may do no more than charge one offense—the offense of sedition; but as to whether the utterances alleged constitute one offense or many depends upon the circumstances of the particular case. All of the alleged utterances, if spoken at one and the same time and place, might constitute a single offense, but where spoken at different times and places and to different persons, each utterance, if it constituted the crime of sedition, would be a separate [12] offense. However, no motion to compel an election was interposed, and appellant did not seek to have any of the charges in the information withdrawn from consideration of the jury,

and is therefore in no position here to raise the question. (*State* v. *Reed*, 53 Mont. 292, 298, 163 Pac. 477.)

The language employed by Mr. Justice McFarland, in the case of *People* v. *Wells*, 100 Cal. 459, 34 Pac. 1078, in the light of the intense feeling existing during the war, when righteous indignation over dastardly attacks on our government, our soldiers, and our flag was apt to override the better judgment and knowledge of proper procedure, is particularly applicable to cases such as this: "It is too much the habit of prosecuting officers to assume beforehand that the defendant is guilty, and then expect to have the established rules of evidence twisted, and all the features of a fair trial distorted, in order to secure a conviction. If a defendant cannot be fairly convicted, he should not be convicted at all; and to hold otherwise would be to provide ways and means for the conviction of the innocent."

For the reasons stated, the judgment and order of the district court of Custer county are reversed, and the cause is remanded to said county for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

STATE EX REL. GRIFFITHS, APPELLANT, *v.* MAYOR OF CITY OF BUTTE ET AL., RESPONDENTS.

(No. 4,100.)

(Submitted February 26, 1920. Decided March 14, 1920.)

[188 Pac. 367.]

Cities and Towns—Fire Department — Council—Removal of Chief—Charges—Sufficiency—Certiorari—Scope of Writ.

Cities and Towns—Council—Removal of Chief of Fire Department—Charges—Sufficiency.

1. In proceedings before a city council for the removal of the chief of the fire department, the charges need not be stated with the technical accuracy required in a complaint filed in court.

Same.

2. Charges that the chief of a fire department did not respond promptly to fire-alarms, did not know the location of fire hydrants, was incompetent to direct the fighting of fire, failed to tear down certain buildings as required by state fire marshal, *etc.*, *held* sufficiently definite and certain to advise the accused of the nature of the charges against him and to enable him to prepare his defense.

Certiorari—Scope of Writ.

3. The writ of review cannot be used to correct errors committed in the exercise of jurisdiction.

Same—City Council—Removal of Fire Chief—Extent of Review of Order of Removal.

4. On *certiorari* to review an order of the city council removing its chief of the fire department, the court may ascertain whether the charges against accused were or were not supported by the evidence, but cannot determine its preponderance.

Same—Removal of Fire Chief—Evidence—Sufficiency.

5. Evidence reviewed and *held* on *certiorari*, to substantially support the charges referred to in paragraph 2 above.

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

Certiorari by the State, on the relation of Morgan Griffiths, against the Mayor of the City of Butte and others, to set aside an order of the council removing relator from the office of Chief of the Fire Department. From a judgment affirming the order of the council, relator appeals. Affirmed.

Mr. W. E. Carroll, for Appellant, submitted a brief; *Mr. Frank Walker* and *Mr. C. S. Wagner,* of Counsel, argued the cause orally.

We submit that this court has the right to review the evidence and ascertain if there is any substantial evidence to legally warrant the decision below. (*Gilbert* v. *Board of Police, etc.,* 11 Utah, 378, 40 Pac. 264; 6 Cyc. 827.) When the decision below has no evidence to support it, the question then becomes one of law, not of fact. (3 Cyc. 348, 351, 358, 360, 362.) Where a material fact is unsupported, or is contrary to all the substantial evidence, such finding may be in itself an error of law; but the court will not review to determine the preponderance of the evidence. (*Somers* v. *Wescoat,* 66 N. J. L. 551, 49 Atl. 462; *Kidder* v. *Townsend,* 3 Johns. (N. Y.) 435.) Appellant

is aware of the usual rule that on appeal in *certiorari*, the conclusion of the trial court will not ordinarily be disturbed if in any reasonable view of the evidence its finding is supported, but if the finding is not supported by any evidence, it will be set aside. (*International Harvester Co.* v. *Industrial Com.*, 157 Wis. 167, Ann. Cas. 1916B, 330.)

Mr. R. L. Clinton, Mr. C. F. Juttner and *Mr. N. A. Rotering*, for Respondents, submitted a brief; *Mr. Clinton* and *Mr. Rotering* argued the cause orally.

Citing: *Bolger* v. *Common Council of Detroit*, 153 Mich. 540, 117 N. W. 171; *Dunn* v. *City of Taunton*, 200 Mass. 252, 86 N. E. 313; *Sullivan* v. *Martin*, 81 Conn. 585, 71 Atl. 783; *State* v. *Henderson*, 145 Iowa, 657, Ann. Cas. 1912A, 1286, 124 N. W. 767; *Commonwealth* v. *Egan*, 234 Pa. St. 24, 82 Atl. 1098; *Skeen* v. *Paine*, 32 Utah, 295, 90 Pac. 440; *People* v. *Coler*, 10 App. Div. 65, 57 N. Y. Supp. 636; affirmed 159 N. Y. 569, 54 N. E. 1094; *Commonwealth* v. *City of Philadelphia*, 232 Pa. 5, 81 Atl. 59; *Duffy* v. *Cooke*, 239 Pa. St. 427, Ann. Cas. 1915A, 550, 86 Atl. 1076; *Ryan* v. *Handley*, 43 Wash. 232, 86 Pac. 398.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

On September 10, 1915, written and verified charges were presented to the city council of Butte against relator, as chief of the fire department, an answer was filed and a hearing had at the next regular meeting of the council, and by a majority vote of all of the members an order was made and entered removing him from his official position. Relator thereupon sued out, in the district court of Silver Bow county, a writ of review, to which return was duly made, and a transcript of the testimony taken before the council was permitted to be filed with the court. On the hearing the court entered judgment affirming the order of the council.

1. Appellant contends that the pleading filed with the council was not sufficient, and that the court should have required [1] the council to cause the charges to be made more definite and certain. While the pleading may not have been as accurate in its statements or as artistically drawn as is desirable in a complaint filed in court, such technical accuracy is not required in proceedings had before a body of laymen. In an analogous case, this court said: "The only requirement of the statute is that the charge shall be reduced to writing (section 3309, Rev. Codes); and if in substance it makes out any one of the triable offenses mentioned, it is sufficient. And even in determining this question the courts will apply the most liberal rules of construction, and necessarily so. The members of the police trial board are not required to be learned in the law of pleading and practice; in fact, many board members are laymen, entirely unfamiliar with court procedure. Neither is it demanded nor contemplated that the person preferring charges against a policeman shall specify the details of the charge, give a particular designation to the offense, or employ an attorney to draft the complaint. To insist upon strictness in construing a written charge of this character would defeat the purpose of the law and render members of the police force immune from discipline." (*Bailey* v. *Examining and Trial Board,* 45 Mont. 197, 199, 122 Pac. 572, 573.)

Testing the written charges by the above rule, it will be sufficient to merely note the nature of the charges made, among which [2] we find the allegations: First, that Morgan Griffiths was appointed in an irregular manner, setting out the manner of his appointment at length, and alleging that he therefore is usurping the office without legal or valid appointment; second, that on the occasion of the McGowan fire relator did not respond for from ten to twenty minutes after a reasonably competent fire chief would have been on the ground, describing the manner in which he arrived, and that, on his arrival, he did not know the location of fire hydrants, and lost at least five minutes searching for a hydrant, it being alleged that not knowing the location

of fire hydrants is a violation of the rules and regulations; that he directed, or permitted the water to be directed, on the fire in such a manner as to drive the flames against an adjoining building, when there was an open space of several hundred feet on the opposite side of the burning building; third, that he persisted in keeping at the Caledonia Street fire station a horse unfit to work, which was removed only after repeated complaints by citizens; fourth, that relator was incompetent to direct the fire department when at work, is not a fire fighter, and is afraid to enter burning buildings, does not know how to direct a force fighting fire, and does not know how, nor cares, to protect men while fighting fire; fifth, that he made no rules or regulations governing the men, and no rules as to the territory to be covered by them; and, sixth, that, though ordered by the state fire marshal so to do, failed and neglected to tear down and destroy certain buildings and structures which were a fire menace.

The foregoing examples will serve to disclose the fact that the written charges as filed were adequate, as a pleading, and were sufficiently definite and certain to advise relator of the nature of the charges against him and to enable him to prepare his defense.

2. Appellant contends that "the evidence failed of any proof of any facts attempted to be alleged." This contention raises the question as to how far the court, on a writ of review, can go into an examination of the evidence received by the inferior tribunal, board, or officer.

Section 7209, Revised Codes, provides that—"The review upon this writ cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer."

The writ cannot be used to correct errors committed in the [3] exercise of jurisdiction. (*State ex rel. King* v. *District Court*, 24 Mont. 494, 498, 62 Pac. 820.)

Under section 3328, Revised Codes, charges may be preferred against a fire chief or other member of the fire department, and "if such charges are found proven by the council, the council

[4] by a vote of a majority of the whole council, may impose such penalty as it shall determine the offense warrants, * * * " including removal from the fire department. There is no appeal provided for from the order of the council.

"Where the power of a municipal body to remove from office is not discretionary, but only for cause, after notice and hearing, the proceedings are judicial in their nature and may be reviewed on *certiorari* [the writ of review]. On such review, the court will inspect the record to see whether the body had jurisdiction and kept within it, and whether the charges were sufficient in law, and will examine the evidence, not for the purpose of weighing it, but to ascertain whether it furnishes any legal and substantial basis for the removal." (28 Cyc. 442; *In re Carter*, 141 Cal. 316, 74 Pac. 997; *Carter* v. *Durango*, 16 Colo. 534, 25 Am. St. Rep. 294, 27 Pac. 1057; *State* v. *Duluth*, 53 Minn. 238, 39 Am. St. Rep. 595, 55 N. W. 118; *People* v. *Nichols*, 79 N. Y. 582; *Hayden* v. *Memphis*, 100 Tenn. 582, 47 S. W. 182; *State ex rel. Wynne* v. *Examining and Trial Board*, 43 Mont. 389, Ann. Cas. 1912C, 143, 117 Pac. 77.)

If the charges are unsupported by the evidence, or the findings are contrary to all the substantial evidence, or where the decision below has no evidence to support it, the question then becomes one of law, and the evidence may be reviewed to determine if such is the fact, but the court cannot review the evidence to determine the preponderance thereof. (3 Cyc. 348–362; *Somers* v. *Wescoat*, 66 N. J. L. 551, 49 Atl. 462; *Kidder* v. *Townsend*, 3 Johns. (N. Y.) 435.)

A careful examination of the record discloses that all the proceedings of the council were regular and in conformity with the provisions of the statutes on the subject; the council had jurisdiction and kept within it.

In order to determine the question concerning the evidence, it would be well to first ascertain what are some of the duties [5] of a chief of the fire department.

Section 3331, Revised Codes, provides that "the chief of the fire department shall have sole command and control over all

persons connected with the fire department, * * * and shall possess full power and authority over its organization, government and discipline; * * * he shall have charge of and be responsible for the engines and other apparatus, * * * and see that they are at all times ready for use in the extinguishing of fires." This statute is supplemented, in the city of Butte, by ordinance which reads, in part as follows: "It is the duty of the fire chief to, at least once a month, * * * carefully examine into the condition of all the buildings, engines, animals, and apparatus used in the fire department, and see that the same is at all times in good repair and condition, and to report to the city council any defect or injury to the same, * * * and shall, with the consent of the mayor, cause all necessary repairs to be made without delay. * * * The chief of the fire department, or any assistant chief acting in his place, shall have entire command and control and direction of all members of the fire department and over other persons who may be present at fires. The members of the fire department, under the direction of the fire chief of the fire department, or assistant chiefs of the fire department, shall, upon every alarm of fire, repair with the utmost dispatch to the place of the fire * * * and there work under the direction of the chief of the fire department or his assistants, in the most effective manner until the fire is extinguished. * * * " He "may from time to time establish such rules and regulations as he may deem advisable."

Bearing in mind, then, the duties imposed upon the chief or head of a fire department, and, from the necessity of adequate fire protection in a city such as Butte, the importance of proper and adequate regulations, orders, and directions to the men under him, and of the inspection of the equipment for fighting fire, and the prompt repair or replacement of that not in perfect condition, we come to the consideration of the evidence introduced. We find that there is evidence, with reference to the McGowan fire—not the statements of the McGowans alone, but of disinterested witnesses—that ten to twenty minutes elapsed before the arrival of the chief and the department; that the chief drove past,

and had to return around on another street; that five minutes more were lost in an attempt to locate the fire hydrant, and that, when the water was turned on, the chief permitted it to be directed in such a manner as to drive the flames toward a building a few feet away, whereas there was no building within several hundred feet in the opposite direction. We find the evidence of firemen that the chief never took command and directed their activities; that at a fire in the Owsley Block a fireman had to push the chief out of the doorway in order to enter with the chemical apparatus. We find evidence in the record that a fire horse, fifteen to nineteen years old, had been relegated to the street department, but was, at the direction of the relator, taken to a fire station, and, though thin, lame and in such condition that he had to be dragged from his stall, was kept there for some time, over the protest of firemen and citizens. We find the statement that the chief never entered burning buildings; that, though dissensions and quarrels were frequent, the chief made no attempt to maintain discipline. It appears that a certain populous district had been added to the city limits shortly after the appointment of relator, in April, and at the date of the hearing he had made no provision for fire protection therein. These are but samples from several hundred pages of testimony; whether supported by a preponderance of the evidence or not, it is substantial evidence of the charges made, and, as the court said in *Bolger* v. *Detroit*, 153 Mich. 540, 117 N. W. 171: "With the strength or weakness of the case * * * we have nothing to do; our inquiry is limited to ascertaining whether there was any competent evidence, however weak, tending to sustain the findings of the common council," and this was the extent of the examination permitted to the lower court in this proceeding.

We find no substantial error in the record. The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

FIRST NATIONAL BANK OF NEW CASTLE, APPELLANT, *v.* GROW ET AL., RESPONDENTS.

(No. 4,086.)

(Submitted February 25, 1920. Decided March 15, 1920.)

[188 Pac. 907.]

Promissory Notes Payable to Order—Negotiability—Assignment Without Indorsement—Effect—Pleading—Complaint.

Promissory Note Payable to Order—Assignment Without Indorsement—Effect.

1. Where a negotiable instrument made payable to order is transferred without indorsement, its negotiable character is destroyed and the assignee takes it subject to all such defenses as might have been available against it in the hands of the payee.

Pleading—Specific Control General Allegations.

2. Where both general and specific allegations are made concerning the same matter, the latter control.

Promissory Notes—Negotiability—Complaint—Insufficiency.

3. *Held*, under the above rule, that the complaint in an action on a promissory note made payable to order which specifically alleged that the payee "sold, assigned and transferred" it to plaintiff, disclosed an assignment, and that the general succeeding allegation that plaintiff "is now the lawful owner and holder" thereof, was insufficient to supply the averment that the transfer was had by indorsement.

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

ACTION by the First National Bank of New Castle against Chester A. Grow and others. From a judgment for defendants and an order denying new trial, plaintiff appeals. Affirmed.

Mr. E. K. Cheadle and ***Mr. Burton R. Cole***, for Appellant, submitted a brief; ***Mr. Cole*** argued the cause orally.

Although there are decisions to the effect that a direct averment that plaintiff is the owner and the holder of the instrument sued on is the averment of a mere conclusion of law and is insufficient, there are others to the effect that such an allegation is sufficient to show a *prima facie* right to recover, and that the mode of acquisition may be supplied by proof. If the complaint

otherwise shows title in plaintiff, an additional allegation that he is the owner and the holder is unnecessary and superfluous. (8 C. J., 890, sec. 1164; *Clark* v. *Moses*, 50 Ala. 326; *Walker* v. *State Bank*, 4 Stew. & P. (Ala.) 215; *Rice* v. *Hogan*, 8 Dana (Ky.), 133; *New South Brewing etc. Co.* v. *Price*, 21 Ky. Law Rep. 11, 50 S. W. 963; *Draper* v. *Fletcher*, 26 Mich. 154; *Maccarone* v. *Hayes*, 85 App. Div. 41, 82 N. Y. Supp. 1005; *Holstein* v. *Rice*, 15 How. Pr. 1; *Gunter* v. *McEntire* (Tex. Civ. App.), 24 S. W. 590; *Reeve* v. *Fraker*, 32 Wis. 243.)

Under the negotiable instruments law, it has been held sufficient to allege that plaintiff is the owner and in possession of the instrument, although it is not payable to plaintiff and there is no allegation that it has been assigned or indorsed to him. The leading case cited as to this point is *Callahan* v. *Louisville Dry Goods Co.*, 140 Ky. 712, 131 S. W. 995. (8 C. J., 890, note 88.)

Mr. O. W. Belden, for Respondents, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The allegations of the complaint, omitting merely formal parts, are to the effect that on June 13, 1912, the defendants executed and delivered their certain promissory note for $1,500, payable to the order of J. E. Blakeley; that prior to the maturity of the note Blakeley "for a valuable consideration sold, assigned and transferred the said note to the plaintiff herein; that the plaintiff is now the lawful owner and holder of the said note, and that the same is wholly due and unpaid." A copy of the note is set forth in the complaint.

The answer admits the execution of the note, and by way of affirmative defense alleges that it represented the purchase price of a stallion purchased by defendants from Blakeley under a special written guaranty; that the note and guaranty were executed contemporaneously and constituted parts of the same trans-

action; and that the terms of the guaranty were breached by Blakeley. The trial of the cause resulted in a general verdict for defendants, and from the judgment entered thereon and from an order denying a new trial, plaintiff appealed.

Twelve specifications of error are assigned, but they involve but a single fundamental question, and may be considered upon the objections to instruction No. 7, given by the court. That instruction follows: "You are instructed that the plaintiff bank [1] claims to be the holder of the note by assignment and transfer, and that in this case such claim does not cut off equitable defenses against the payee thereof, and if you find from the testimony in this case, by a preponderance thereof, that the defendants were deceived, or that the note was obtained from them by misrepresentation or fraudulent practice on the part of J. E. Blakeley, the payee therein, or that he failed to live up to his contract alleged to have been given contemporaneously therewith, then your verdict must be for the defendants in this case."

Do the allegations of the complaint set forth above admit of the interposition of the special defense against Blakeley? We think they do. In *Cornish* v. *Woolverton*, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4, this court said: "A negotiable instrument, payable to order, must be indorsed by the payee, in order to preserve its negotiability in the hands of a subsequent holder. A transfer without indorsement destroys its negotiable character, and the assignee takes it subject to all such defenses as might have been available against it in the hands of the payee."

Appellant insists that the allegation that "plaintiff is now the [2, 3] lawful owner and holder of said note" is sufficient to show *prima facie* a right in plaintiff as a holder in due course, and that the mode of acquisition may be supplied by proof, and 8 Corpus Juris, 890, is cited in support of the contention. If that allegation stood alone, much might be said in support of the argument, particularly in view of the provisions of sections 5900 and 5907, Revised Codes (N. I. L. 51, 59). But since the general allegations of ownership and possession are modified by special allegations disclosing the mode of transfer, plaintiff nar-

rows the issues and limits itself to the particular mode alleged. This follows from the general rule of pleading that, where both general and specific allegations are made respecting the same matter, the latter control. (31 Cyc. 85.)

This is not a case in which the complaint fails to state the mode of transfer; on the contrary, the allegations of the complaint, taken together, disclose affirmatively that whatever title or right of possession plaintiff has is dependent upon a transfer by assignment from Blakeley, the payee. Under the rule announced in *Cornish* v. *Woolverton* above, the note was non-negotiable in the hands of the plaintiff, and subject to any defense which would have been available against Blakeley had he brought the suit.

We do not pass upon the sufficiency of the answer. It was not tested by demurrer or otherwise, but the cause appears to have been tried upon the theory that a defense is pleaded, and under that view of the case the court was correct in admitting evidence of the special defense and in submitting instruction No. 7 above.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

Rehearing denied May 29, 1920.

HEILMAN, RESPONDENT, v. LOUGHRIN ET AL., APPELLANTS.

(No. 4,101.)

(Submitted February 26, 1920. Decided March 15, 1920.)

[188 Pac. 370.]

Mining Claims—Quieting Title—Defective Certificate of Location—Relocation—Estoppel—Costs—Equity—Findings—Conclusiveness.

Mines and Mining—Purpose of Certificate of Location.

1. The purpose of a recorded certificate of location of a quartz lode mining claim is to impart to subsequent locators constructive notice of the existence of the claim, its location and extent.

Same—Defects in Certificate of Location—When Immaterial.

2. As to parties who had actual notice of the location and boundaries of a mining claim when they relocated it, defects in a recorded certificate of location filed by the original locator must be deemed immaterial.

Same—Relocation—Defective Certificate of Location—Estoppel.

3. One claiming under a relocation of mining ground by virtue of a prior locator's forfeiture impliedly admits the validity of the prior location and is estopped to assert defects in the certificate of location in an action to quiet title.

Equity—Appeal and Error—Findings—Conclusiveness.

4. In equity cases, the findings of the trial court will not be disturbed on appeal, unless the evidence clearly preponderates against them.

Quieting Title—Plaintiff Successful in Part—Costs—Discretion.

5. The disposition of the question of costs in an action to quiet title to two quartz lode mining claims, in which plaintiff prevailed as to one claim and defendants as to the other, *held* to have been within the sound, legal discretion of the trial court (Rev. Codes, sec. 7156), with whose action in allowing costs to plaintiff only the supreme court will not interfere in the absence of a showing of a manifest abuse of discretion.

Appeal from District Court, Granite County; George B. Winston, Judge.

ACTION by Anna Heilman against Pat and Patsy Loughrin. From a judgment for plaintiff and an order denying them a new trial, the defendants appeal. Affirmed.

Mr. Wingfield L. Brown and *Mr. R. Lewis Brown*, for Appellants, submitted a brief, the former arguing the cause orally.

Mr. D. M. Durfee and *Mr. W. E. Moore*, for Respondent, submitted a brief; *Mr. Durfee* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action to quiet title to two unpatented quartz lode mining claims designated, respectively, the Copper Queen and Anna. The complaint states a separate cause of action with reference to each claim and is in the form usually employed in such cases. In answer to the first cause of action, defendants deny that plaintiff is, or at any time subsequent to January 1, 1916, was, the owner, in possession, or entitled to the possession of the Copper Queen claim, and admit that defendants assert title to the premises in question. As an affirmative defense it is alleged that whatever interest plaintiff had in the Copper Queen claim was forfeited by her failure to do the annual representation work for the year 1915; that thereafter, on January 1, 1916, while the premises were open to relocation, defendants went upon the ground and located it as the "Blue Ribbon" claim. A similar defense is interposed to the second cause of action; defendants claiming the ground covered by the Anna location under their relocation of it as the "Old Crow" claim. All affirmative allegations were put in issue by reply. The trial court found in favor of plaintiff upon the first cause of action and in favor of defendants upon the second. Defendants have appealed from the judgment in so far as it awards to plaintiff the Copper Queen claim, and from an order denying a new trial.

1. To make out her *prima facie* case, plaintiff introduced evidence tending to show that the necessary steps were taken to a completed location of the Copper Queen claim, including the introduction in evidence of the recorded certificate of location. Ap- [1] pellants insist that the certificate is void, in that it does not contain a sufficient reference to some natural object or permanent monument to identify the claim. The certificate was admitted in evidence without objection, and, so far as disclosed by the record, this contention is made now for the first time. Pass-

ing this, however, the evidence given by the defendants themselves discloses that they knew of plaintiff's claim to the Copper Queen, were familiar with the location and boundaries of that claim, and watched it diligently during 1915 to ascertain whether plaintiff performed the required amount of assessment work. Under these circumstances defendants cannot rely upon the defects in the certificate.

The purpose of the certificate is to impart constructive notice to subsequent locators of the existence of the claim, its location, and extent, just as the markings upon the ground are intended to impart actual notice of the same facts. (2 Lindley on Mines, 3d ed., sec. 379.) As to parties having actual notice, as defend-
[2] ants did have in this instance, the defects in the certificate, whatever they may be, are to be deemed immaterial. Section 2293, Revised Codes, provides: "No defect in the posted notice or recorded certificate shall be deemed material, except as against one who has located the same ground, or some portion thereof, in good faith and without notice." Furthermore, as defendants
[3] claim under a relocation of the ground by virtue of plaintiff's forfeiture of the Copper Queen, they impliedly admit the validity of the prior location. (*Belk* v. *Meagher*, 104 U. S. 279, 26 L. Ed. 735 [see, also, Rose's U. S. Notes]; 27 Cyc. 602; 2 Lindley on Mines, sec. 404.)

2. It is earnestly insisted that the evidence establishes beyond controversy that plaintiff did not perform the required amount of assessment work upon the Copper Queen claim during 1915. The answer admits that she did work of the value of $30, and defendants' evidence discloses that the work done by plaintiff was reasonably worth from $50 to $80, or thereabouts. In addition to the work conceded to have been done, plaintiff introduced evidence tending to prove that she had expended $210 for assessment work done during 1915. The evidence was given principally by Joseph Heilman, her husband, who testified that he performed sixty-four days' work for the $210; that about twenty-three days' work was performed in extending the north

tunnel on the Copper Queen a distance of twenty-two feet; that the remainder of the time was spent in prospecting over the two claims and in securing samples from a shaft on the Copper Queen. The witness Ringeling testified that the work of extending the tunnel was reasonably worth $100; so that, if we disregard the testimony concerning the work of prospecting, the evidence is ample to sustain the court's finding, unless, as defendants contend, Joseph Heilman's testimony is not entitled to any credit whatever.

There are some inconsistencies and contradictions in Heilman's testimony, but to a limited extent, at least, he was corroborated by other evidence; but if he were not, it does not follow that a new trial should be granted. The court below, sitting without a jury, was not bound to decide in conformity to the declarations of defendants' witnesses, if they did not produce conviction. (Sec. 8028, Rev. Codes.)

It is the rule in equity cases that the findings of the trial court [4] will not be disturbed on appeal unless the evidence clearly preponderates against them. (*Smith* v. *Hoffman*, 56 Mont. 299, 184 Pac. 842.) The lower court had the several witnesses before it, heard them testify, observed their demeanor, and was in a much more advantageous position to determine their credibility than are the members of this court. We cannot say from the record that a different conclusion was commanded by the evidence. (*Roberts* v. *Oechsli*, 54 Mont. 589, 172 Pac. 1037.)

3. Costs were awarded to plaintiff, and appellants complain of [5] the order and insist that, as each party was successful in part, the costs should have been apportioned between them, or that defendants should have been permitted to offset their costs against the costs awarded to plaintiff. We think it clear that this is a case which falls within the purview of section 7156, Revised Codes, and that the disposition of the question of costs was within the sound, legal discretion of the court. (11 Cyc. 37; 15 Corpus Juris, 39.) There are considerations which might well have appealed to the court's discretion and fully justified the particular disposition made of the costs in this case; at least,

it cannot be said that the record discloses clearly a manifest abuse of discretion.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

FIRST NATIONAL BANK OF LEWISTOWN, APPELLANT, v. WILSON ET AL., RESPONDENTS.

(No. 4,097.)

(Submitted February 25, 1920. Decided March 15, 1920.)

[188 Pac. 371.]

Promissory Notes—Failure of Consideration—Holder in Due Course—Evidence—Directed Verdicts.

Promissory Notes—Failure of Consideration—Evidence—Judgment-roll in Other Action.

1. In an action on a promissory note, a judgment-roll showing the cancellation of a contract for the sale of land and recovery of the premises by the seller was evidence of failure of consideration for the note given in payment, and if a bank suing on the note took it with knowledge of the failure of consideration and held it subject to the defense set up, admission of the roll in evidence was proper.

Directed Verdict—When not Warranted.

2. The fact that testimony is uncontradicted is not alone sufficient to warrant a directed verdict, where the inferences to be drawn from all the circumstances are open to different conclusions by reasonable men.

Promissory Notes—Purchaser in Good Faith.

3. Where a bank receives a negotiable promissory note before maturity as collateral security for a pre-existing debt, it is, to the extent of its claim, a purchaser in good faith and not affected by equities between the parties to the instrument of which it has no notice.

Same—Knowledge of Failure of Consideration—Purchaser not One in Good Faith.

4. A bank which had been made depositary of escrow papers evidencing a sale of land, the two notes given in payment being made payable at different dates at said bank and the papers to be delivered to the buyer upon payment of the first, and which, though knowing of failure

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As to what circumstances are sufficient to put a purchaser of negotiable paper on inquiry, see notes in 29 L. R. A. (n. s.) 351; 44 L. R. A. (n. s.) 395; L. R. A. 1918F, 1148.

of the first payment and that the seller had the right to declare a forfeiture of the contract, twenty-eight days after its due date accepted the second note as security for a pre-existing debt, was not a purchaser without notice.

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

ACTION by the First National Bank of Lewistown against J. H. Wilson and Maud Wilson, his wife. From a judgment for defendants and an order denying a motion for a new trial, the plaintiff appeals. Affirmed.

Messrs. Blackford & Huntoon, for Appellant, submitted a brief.

Mr. O. W. Belden, for Respondents, submitted a brief and argued the cause orally.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This action was brought on a promissory note. The answer denies the allegations of the complaint, except as to nonpayment, and alleges, as an affirmative defense, that the note in question was a part of the consideration for a contract for the purchase of certain lands; was never delivered and came into the hands of the bank's transferee wrongfully; is without consideration and was to have been placed in escrow with the deed, *etc.;* and that it was transferred to the bank in an endeavor to defraud respondents. The answer further alleges that the bank had notice thereof and was not an innocent purchaser for value, or any purchaser of the note.

Four special findings were returned by the jury, three of which, complained of by the appellant, were to the effect that the bank did have notice of the defense to the note, or had knowledge of facts which would have put a reasonable man upon inquiry. The jury also returned a general verdict for the respondents, and judgment was entered accordingly. Motion for a new trial having been denied, the appeal is from the judgment and the order of the court denying the motion.

From the evidence adduced it appears that on May 20, 1914, respondents were negotiating with one Gill for the purchase of a ranch. Gill consulted an officer of the appellant bank by the name of Straight as to the advisability of making the deal, and thereafter, on the same day, deposited the deed, assignments and other papers with the bank in escrow, making the bank a party to the escrow agreement, which agreement described two certain promissory notes, the first for $1,688, payable November 1, 1914, and the second for $900, payable November 1, 1915, both of which were made payable at this particular bank. The escrow agreement provided that on payment of the first note, November 1, 1914, the bank was to deliver to respondents the deed and assignment mentioned, and thereupon the escrow would be at an end. Respondent defaulted in the first payment, and the escrow agreement and papers remained in the possession of the bank. Thereafter, on the twenty-eighth day of November, 1914, the bank, being still in the possession of the escrow papers and agreement in which the said note for $900 was fully described, accepted the transfer thereof from Strouf as collateral security for a pre-existing debt. On January 12, 1915, Gill commenced an action for the cancellation of the contract for sale on the ground of the breach thereof.

Appellant makes ten assignments of error:

1. Specifications I, II, and III allege error in the admission [1] of the judgment-roll in the case of *Gill* v. *Wilson*, showing the cancellation of the contract and recovery of the premises by Gill. The judgment-roll was evidence of the failure of the consideration for the note sued upon here, and if the bank took the note with knowledge of the failure of consideration by reason of the breach of the contract, and held it subject to the defense set up, the admission of this evidence was proper.

2. Specification of error No. IV is on the court's refusal to [2] grant appellant's motion for a directed verdict. Counsel contend that the claim that the bank had knowledge is based upon the conversation between Gill and Straight, which was

not denied, and that there was therefore no question of fact for the jury to decide.

Section 6761, Revised Codes, provides that where "the case presents only questions of law, the judge may direct the jury to render a verdict in favor of the party entitled thereto." And in the case of *Consolidated Min. Co.* v. *Struthers*, 41 Mont. 565, 111 Pac. 152, this court held that "the right of the plaintiff and defendant to a jury trial upon issues of fact stands upon the same footing. If the pleadings present such issues, *prima facie* each is entitled to have a jury determine them; but, if during the course of the trial it becomes apparent that there are no such issues in the evidence, the decision falls within the province of the court." While it is true the conversation between Gill and Straight was not disputed, it is not alleged that such conversation alone gave notice to the bank, and respondents are not bound by the testimony concerning that transaction alone, but were at liberty to take into consideration all the circumstances surrounding the transaction between the witness Strouf and the bank, and from all the facts and circumstances determine as to whether or not the bank either had notice of any defense to the note or was chargeable therewith, and such issue was properly submitted to the jury.

The fact that testimony is uncontradicted is not alone sufficient to warrant a directed verdict, where the inferences to be drawn from all the circumstances are open to different conclusions by reasonable men. (*Arnd* v. *Aylesworth*, 145 Iowa, 185, 29 L. R. A. (n. s.) 638, 123 N. W. 1000; *Dibble* v. *Northern Assur. Co.*, 70 Mich. 1, 14 Am. St. Rep. 470, 37 N. W. 704; *Elwood* v. *Western U. Tel. Co.*, 45 N. Y. 549, 6 Am. St. Rep. 140.) In the *Arnd Case* the court said: "'It is often a difficult question to decide when a witness is, in a legal sense, uncontradicted. He may be contradicted by circumstances as well as by statements of others contrary to his own. In such cases courts and juries are not bound to refrain from exercising their judgment, and to blindly adopt the statements of the witness, for the simple reason that no other witness has denied them,

and that the character of the witness is not impeached.' That the circumstances under which a note is negotiated may be sufficient to sustain a verdict against the holder's positive denial of notice has been frequently held." (*Bennett State Bank* v. *Schloesser,* 101 Iowa, 571, 70 N. W. 705; *Hoffman* v. *Leidfarth,* 51 Iowa, 711, 2 N. W. 518; *Peirson* v. *McNeal,* 137 Mich. 158, 100 N. W. 463.)

Counsel for respondents contends, however, that regardless [3] of notice or knowledge, the bank, having received the note in question as collateral security for a pre-existing debt, is not a holder for value in due course, relying upon the following statement of Michie on Banks and Banking, section 179, page 1557: "Where a bank takes security for a pre-existing debt, it takes it subject to the equities of third persons; but where the bank advances money upon faith of the collateral it occupies the position of a *bona fide* holder for value"—citing *Cleveland* v. *State Bank,* 16 Ohio St. 236, 88 Am. Dec. 445; *Roxborough* v. *Messick,* 6 Ohio St. 448, 67 Am. Dec. 346. But the Ohio cases cited do not bear out the text-writer; they have to do only with an assignment and not with an indorsement and transfer and the statement made by Michie is contrary to the authorities on the subject. (See *Railroad Co.* v. *National Bank,* 102 U. S. 14, 26 L. Ed. 61; *Swift* v. *Tyson,* 16 Pet. 1, 10 L. Ed. 865 [see, also, Rose's U. S. Notes]; *Farmers' State Bank* v. *Blevins,* 46 Kan. 536, 26 Pac. 1044; *Gammon* v. *Huse,* 9 Ill. App. 557; *Goodman* v. *Simonds,* 20 How. 343, 15 L. Ed. 934 [see, also, Rose's U. S. Notes].) In *Yellowstone Nat. Bank* v. *Gagnon,* 19 Mont. 402, 61 Am. St. Rep. 520, 44 L. R. A. 243, 48 Pac. 762, this court said: "The indorsee of negotiable paper who takes the same before maturity as collateral for a pre-existing debt of the payee is to the extent of his claim a purchaser in good faith, and is not affected by equities between the parties of which he has no notice." If, therefore, the bank was without notice at the time of its transaction with Strouf, it was a holder in due course.

Specifications of error Nos. V to X are based upon the con-
[4] tention that there is an entire absence of evidence sufficient to sustain the verdict and the three special findings mentioned, regarding notice, and will be considered together.

The replication admits the execution of the contract and that the note here sued upon is the $900 note referred to in the contract. The appellant here was made the custodian of the escrow papers and a party to the escrow agreement; the notes were payable at the appellant bank. Under the escrow agreement, the first note was payable November 1, 1914, and thereupon it devolved upon appellant to deliver over to respondents the escrow papers. The payment was not made and the appellant retained possession of those papers, and it cannot be conceived how, under such circumstances, appellant could contend that it did not know of the failure of respondents, and its consequent failure to deliver the deed and other papers as directed.

Had the transfer to the bank been made prior to the breach of the contract, the knowledge of the transaction would not, in itself, defeat recovery, for the bank would have had the right to presume that respondents would fulfill their contract. In the case of *Baker State Bank* v. *Grant*, 54 Mont. 7, 166 Pac. 27, it was held that where the bank knew, when it took from the seller of an automobile notes executed by the purchaser, that the car was sold under a warranty and that the consideration for the notes might possibly fail, it was nevertheless a holder in due course, as defined in section 5900, Revised Codes, there having been no breach of the warranty at the time the notes were negotiated,—that the bank had the right to presume that the seller's contract of warranty would be carried out in good faith.

However, the bank here did not receive the note until twenty-eight days after the breach of the contract, and not until the seller had the right to declare a forfeiture of the contract and thus withdraw the consideration for this note. Surely the bank was not justified in presuming that the seller would not declare such forfeiture, and therefore, at the time the bank took the note, it was as though the consideration had already failed. In

the *Baker State Bank Case,* it is said: "If the breach had occurred before the notes were transferred and the bank knew of such breach, it could not claim to be a holder in due course."

Clearly, there was evidence justifying the finding of the jury that the bank did have actual knowledge of the infirmity or defect, or knowledge of such facts that its action in taking the instrument amounted to bad faith. (Sec. 5904, Revised Codes.) The jury, and the trial court on the motion for a new trial, had the advantage of seeing the witnesses on the stand and noting their demeanor of testifying, and this court will not therefore disturb their findings. The pleadings were sufficient to raise this issue, and the evidence was sufficient to warrant the findings and the verdict.

The judgment and the order of the district court of Fergus county are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

KUMMROW, APPELLANT, *v.* BANK OF FERGUS COUNTY, RESPONDENT.

(No. 4,118)

(Submitted February 25, 1920. Decided March 15, 1920.)

[188 Pac. 649.]

Fraud—Real Property—Deeds—Reconveyance—Pleading and Practice—Complaint—Sufficiency—Inferences.

Fraud—Real Property—Reconveyance—Complaint—Curing Defect by Answer.

1. In a suit for a reconveyance of land on the ground of fraud, failure of the complaint to allege that the persons making the fraudulent representations were acting for defendants (corporations) was cured by an allegation in the answer in effect asserting that the transaction was had in connection with the purchase.

Same—Failure to Read Instrument—Complaint—Sufficiency.

2. Where a woman, unable to read or write the English language, who charged in her complaint that on making final proof on a desert land entry she was induced by the United States commissioner before whom proof was made, and a member of a firm (subsequently formed into a corporation), that it was necessary for her to sign, and she did sign, a water right location notice in order to acquire title to the lands, whereas the writing was a warranty deed, her failure to have the paper read and explained to her by some disinterested person did not bar her from seeking the relief demanded, and dismissal of the action was error.

Same—Complaint—Sufficiency—Inferences.

3. *Held*, that the complaint, though not a model of pleading, was sufficient under the rule that whatever is necessarily implied in, or reasonably to be inferred from, an allegation, is to be taken as directly averred.

Same—Grantee Liable to Grantor for Conveyance to Third Person After Demand for Reconveyance.

4. Where a deed alleged to have been fraudulently secured from the owner was made to a bank as security for a debt owing to it from the purchaser, and the seller upon learning of the fraud demanded a reconveyance from the bank, which, instead of doing so, conveyed to the purchaser, it did so at its peril and could not escape liability on the ground that concededly no fraud was practiced by it on the seller in the original transaction.

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

SUIT by Maria Kummrow against the Bank of Fergus County and Dengel Bros. From the judgment dismissing the action and an order denying her motion for a new trial, plaintiff appeals. Reversed.

Mr. E. K. Cheadle, for Appellant, submitted a brief and argued the cause orally.

Mr. O. W. Belden, for Respondent, Bank of Fergus County, submitted a brief and argued the cause orally.

MR. JUSTICE HURLY delivered the opinion of the court.

This is an action in which the Bank of Fergus County was named originally as the sole defendant. Later, by stipulation of parties, Dengel Bros., a corporation, was brought in as defendant, and the complaint was amended to include facts arising subsequently to the filing of the original complaint. The com-

plaint alleges the making of a final proof by plaintiff upon a desert land entry embracing a half section of land in Fergus county on April 21, 1913; that the plaintiff is of German descent and wholly unable to read or write the English language and was informed by Gottlieb Dengel and one R. W. Blake, the United States commissioner before whom the final proof was made, that it was necessary for her to sign a water right location notice in order to acquire title to the lands; that she then signed the paper, which they then requested her to sign; that she has since been informed and believes that this paper, instead of being a water right location notice, was a warranty deed in favor of the defendant bank for said land, and that, by reason of the false and fraudulent statements of said Dengel and said commissioner, she was induced, in ignorance of the contents thereof, to sign said deed believing it to be a water right location notice; that no consideration has been paid her for the execution of said deed; that she first learned of the existence of said deed on the fifteenth day of September, 1915, and immediately obtained legal advice as to the proper steps to recover the lands described in said conveyance; that, prior to the commencement of this action, she demanded of the bank that it reconvey to her the lands, but it refused and still refuses so to do; that she has been obliged to incur liability for necessary expenses in attempting to recover said land in the sum of $600.

She further alleges on information and belief that some time during the year 1916, and since the commencement of this action, the defendant bank executed its quitclaim deed for the premises to Dengel Bros., a corporation, and that the latter has placed a mortgage thereon. She also alleges the value of the land to be $9,600. The action is brought to recover the said amount of $600 and for a reconveyance of the premises or, in the event a reconveyance may not be had, for the value of the land with interest. To this complaint a demurrer was interposed by the bank and by consent overruled by the court.

The defendants answered separately. The answer of the bank denies on information and belief the allegations of fraud, admits

the demand and refusal, and that, since the commencement of the action, it has quitclaimed the land to Dengel Bros., and otherwise generally denies the allegations of the complaint. For a further defense the bank alleges that Dengel Bros. caused the land to be conveyed to it as security for certain indebtedness then owing by them to the bank, and that the lands were held by the bank as security for said indebtedness, upon the payment of which it released its said mortgage by executing its acquittance in the form of a quitclaim deed as alleged in the plaintiff's complaint and that since said date the bank has not had and does not now have any interest in said land, and also alleges that it had no dealings whatsoever with the plaintiff.

The defendant Dengel Bros. (a corporation) denies all allegations of fraud, and alleges affirmatively, among other things, that on or about the twenty-first day of April, 1913, and after the plaintiff had made final proof upon the lands, Gottlieb, Joseph and Frank Dengel were copartners under the firm name and style of Dengel Bros., and as such copartners purchased from the plaintiff the lands described in the complaint, paying therefor a full, fair and adequate price; that said copartners were then indebted to the Bank of Fergus County for moneys previously borrowed, and, in order to save encumbering the record, it was agreed between the bank and the partnership that said Dengel Bros. would cause the title to be passed to the bank directly from the seller, to be by it held as security for such indebtedness until such time as such indebtedness had been paid, whereupon the said lands were to be reconveyed to the said Dengel Bros., and that, in pursuance of said understanding and agreement at the time of the payment of the purchase price to plaintiff for said lands, the said Dengel Bros., copartners, requested the plaintiff to convey the lands directly to the bank, and that the plaintiff consented to the same and then and there made, executed and delivered the warranty deed referred to in the complaint to the bank; that later the Dengel Bros., copartners, formed a corporation under the name of Dengel Bros., which corporation succeeded to all the property, claims, interests

and obligations of the said copartners; that during the month of October, 1916, said copartnership fully paid all indebtedness then owing to the defendant bank, whereupon the defendant bank conveyed and quitclaimed the lands described in the complaint to the Dengel Bros., corporation, which ever since has been and now is the owner in fee simple of the lands.

The plaintiff replied to the answer of Dengel Bros., denying the material allegations of said answer, and denying also that said Dengel Bros. purchased from her the lands mentioned and described. There was also reply to the answer of the bank.

The complaint does not state that Blake or Dengel acted for [1] either the bank or the copartnership,—in fact, is silent upon the subject. But the defendant Dengel Bros. has by its answer alleged a purchase of the land from plaintiff, in effect asserting that the transaction was in connection therewith, thereby aiding the allegations of the complaint, which might possibly be otherwise defective in this respect.

Respondents contend that the plaintiff is not in position to [2] assert that the instrument signed by her was other than a deed, for the reason that she failed to read the same, and was negligent in affixing her signature thereto without having the same read and explained to her by some disinterested person, and that, as to the statements alleged to have been made by Blake and Dengel, there is no showing of any relations of confidence and trust between her and them authorizing her to rely thereon. *Hennessy* v. *Holmes*, 46 Mont. 89, 125 Pac. 132, is cited in support of the position so assumed, but in so doing counsel seem to overlook the later case of *Parchen* v. *Chessman*, 49 Mont. 326, Ann. Cas. 1916A, 681, 142 Pac. 631, 146 Pac. 469, wherein this court, speaking through Mr. Chief Justice Brantly, said: "The case of *Hennessy* v. *Holmes*, 46 Mont. 89, 125 Pac. 132, has been understood to declare the rule that a failure by one of the parties to read a contract before signing it, when he has had full opportunity to acquaint himself with its contents, and there has been no fraud or misrepresentation by the other party, is such negligence as will preclude relief, without

regard to the attendant circumstances. So understood, the decision unduly restricts the scope of the rule, though it is fully sustained by the authorities cited. In so far as it conflicts with the views herein expressed, it is to be deemed overruled. As stated before, the term 'mistake' carries with it the idea of fault in him to whom the mistake is imputed. The allegation of mutual mistake imputes negligence to both parties, and this mutuality is the basis of the rule of relief on the ground of mistake. To apply the rule in all its rigidity as it is understood to be declared by the *Holmes Case* would preclude relief in any case, even though the mistake is mutual, and the circumstances are such as to excuse the negligence of the complaining party."

The following excerpt from *Senter* v. *Senter*, 70 Cal. 623, 11 Pac. 782, is appropriate to the conditions in this case: "The substance of a long line of authorities * * * is to be found at page 484 of volume 3 of Kent's Commentaries, where he says: 'The common law affords to everyone reasonable protection against fraud in dealing, but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or of careless indifference to the ordinary and accessible means of information.' This doctrine is entirely compatible with that class of cases in which a party is held liable for having by false and fraudulent representations as to material facts prevented the opposite party from seeking the information which he did not possess, and which but for such representations he might have obtained. When the execution of an instrument, which the party signing did not intend to sign and did not know he was signing, is procured by a misrepresentation of its contents, and the party signing it does so without reading or having it read, relying upon such misrepresentations and fraud and believing he is signing a different instrument, he can avoid the effect of his signature notwithstanding he was able to read and had an opportunity to read the instrument." (*Tillis & O'Neal* v. *Austin*, 117 Ala. 263, 22 South. 975; see, also, *Prestwood* v. *Carlton*, 162 Ala. 327, 50 South. 254; *McGinn* v. *Tobey*, 62 Mich. 252, 4 Am. St. Rep. 848, 28 N. W. 818; *Sibley* v. *Holcomb*, 104

Ky. 670, 47 S. W. 765; *Kemery* v. *Zeigler*, 176 Ind. 660, 96 N. E. 950; *Togni* v. *Taminelli*, 11 Cal. App. 7, 103 Pac. 899.)

Here one of the parties was the United States commissioner, assisting plaintiff in making her final proof who is alleged to have made a portion of the representations, by reason of which she asserts she was deceived. Certainly those intrusted with the duty of assisting public land claimants in perfecting title to such land occupy relations of trust and confidence toward entrymen who by law transact business relating to their offices.

While not a model of pleading, we think that the complaint [3] contains sufficient allegations to sustain the charges of fraud, under the rule recognized by this court in *Buhler* v. *Loftus*, 53 Mont. 546, 165 Pac. 601.

Plaintiff concedes that no fraud was practiced upon her by [4] the bank in the original transaction, and appellant bank asserts therefore that no cause of action is stated as to it. Under the facts disclosed by the pleadings, the bank never acquired the fee title to the land; it being merely a mortgagee or trustee to the amount of the debt owing by Dengel Bros., and its only obligation upon payment of such indebtedness was to execute an acquittance or satisfaction as to the security held. The only method open to the bank in executing such acquittance was by a reconveyance to the party owning the fee. The deed to the bank ran from Mrs. Kummrow, not from Dengel Bros. It is admitted that Mrs. Kummrow, before the commencement of the action, made demand for a reconveyance from the bank to her, and also brought this action to obtain such reconveyance, upon the bank's refusal to convey to her, and that thereafter the bank conveyed the land to Dengel Bros., a corporation, the successor in interest of all properties of Dengel Bros., a copartnership. With two rival claimants the bank may have found it difficult to correctly decide as to which claimant was entitled to the reconveyance, but, having recognized the claim of Dengel Bros. with notice of plaintiff's claim, it made its election at its peril.

The only question in the appeal involves the sufficiency of the pleadings, and by no expression herein does this court in-

tend to convey the meaning that any party has been actually guilty of fraud.

The judgment and order appealed from are reversed.

Reversed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, MATTHEWS and COOPER concur.

STATE EX REL. GLEASON, RELATOR, v. STEWART, SECRETARY OF STATE, RESPONDENT.

(No. 4,574.)

(Submitted February 28, 1920. Decided March 22, 1920.)

[188 Pac. 904.]

Mandamus—Constitution—Initiative and Referendum—Suspension of Act—Petitions—Sufficiency—Constitutional Construction—Elections—"Legal Voter"—County Clerk—Irregularities—Effect.

Constitution—Referendum Petition—Number of Signatures Required.

1. Under the amendment to section 1 of Article V of the Constitution, a petition for referendum to be effective must be signed by five per cent of all the legal voters of the state, and each of two-fifths of all the counties must furnish as signers five per cent of the legal voters of that county; if then the whole number from those counties does not make the required five per cent, the petition may be rendered effective by a sufficient number of signers from other counties to supply the deficiency.

Same—Referendum—Suspension of Act—Number of Signatures Required.

2. *Held*, on *mandamus*, that where suspension of a legislative Act pending submission thereof to a vote of the people is sought through the medium of a referendum, the petition must be signed by fifteen per cent of the legal voters of a majority of the whole number of counties of the state,—not by fifteen per cent of all the legal voters of the state.

Same—Construction—Rules Applicable.

3. The rules applicable to the construction of statutes are also applicable to the construction of provisions of the Constitution.

Same.

4. In construing a provision of the Constitution (or statute), courts must first ascertain its purpose and intent, taking in its obvious sense the language used, aided by the ordinary rules of grammar; recourse

to other rules of construction not being permissible until failure of this method of construction.

Elections—"Legal Voter"—Definition.

5. A legal voter, possessing the qualifications of citizenship, age, residence, *etc.*, is one who has registered.

Referendum—County Clerk—Certifying List of Legal Voters—Invalid Provision.

6. *Held*, that the provision of section 108, Revised Codes, requiring county clerks to compare the signatures on a petition for referendum with their signatures on the registration books and blanks for the preceding general election and certify them to the secretary of state as legal voters, is invalid as excluding all persons who had become legal voters in the interim between the last general election and the time of signing such petition.

Same—Constitution—County Clerk—Irregularity in Certifying Number of Legal Voters—Effect.

7. A legal voter cannot be prevented from exercising his constitutional privilege of signing a referendum petition looking to the suspension of an Act of the legislature, by a showing that a county clerk had not technically pursued the direction of the statute in ascertaining the number of legal voters of his county entitled to sign the petition.

Original application for *mandamus* by the State, on relation of William L. Gleason, against Charles T. Stewart, as Secretary of State. Proceeding dismissed.

Messrs. Gunn, Rasch & Hall, for Relator, submitted a brief; *Mr. M. S. Gunn* argued the cause orally.

Mr. S. C. Ford, Attorney General, *Mr. Frank Woody*, Assistant Attorney General, *Mr. Henry C. Smith* and *Mr. Wellington D. Rankin*, for Respondent, submitted a brief; *Mr. Woody* and *Mr. Rankin* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Original application for *mandamus* to compel the secretary of state to accept and file nominating petitions tendered to him under the provisions of Senate Bill 32 (Chap. 28, Ex. Sess. Laws 1919), which amends the primary law enacted by the people at the general election held in November, 1912. It is alleged in the affidavit for the writ that within six months after the adjournment of the legislature there was filed in the office of the secretary of state in the form prescribed by section 106

of the Revised Codes, a petition signed by more than five per cent of the legal voters of the state, and more than five per cent of the legal voters in more than two-fifths of the counties in the state, ordering that said Senate Bill 32 be referred to the people for their approval or rejection at the general election to be held in November of this year; that the petition was not signed by fifteen per cent of the legal voters of the state, nor by fifteen per cent of the legal voters of each of the majority of the counties in the state, and that no other petition relating thereto had been filed; that, notwithstanding the fact that less than fifteen per cent of the legal voters of the state, and less than fifteen per cent of the legal voters of each of a majority of the counties in the state, have signed the petition, the secretary of state has notified the governor in writing that Senate Bill 32 had been suspended and is inoperative; and that the secretary of state is proceeding upon the presumption that the bill is inoperative and refuses to accept or file the nominating petition of any candidate for a state or other office required to be filed in his office and necessary to authorize the name of any such candidate to be printed on the official ballot to be used at the primary nominating election to be held on April 23 of this year, as in said senate bill provided, and for this reason refuses to comply with the other requirements of the primary law which are not in any wise changed or amended by Senate Bill 32, which compliance is necessary to the holding of the primary nominating election.

In response to the alternative writ, the attorney general appeared by a motion to set it aside and dismiss the proceeding on the ground, among others, that the facts stated in the affidavit did not entitle relator to the relief demanded. The court sustained the motion, announcing orally that it would later, in a written opinion, state the reasons for its action.

The principal question presented by counsel was whether, to [1] suspend the operation of an Act of the legislature under section 1 of Article V of the Constitution, commonly referred to as the initiative and referendum amendment, the petition to

refer must be signed by fifteen per cent of the legal voters of the state. So far as pertinent here, this section reads: " * * * The first power reserved by the people is the initiative and eight per cent of the legal voters of the state shall be required to propose any measure by petition: Provided, that two-fifths of the whole number of the counties of the state must each furnish as signers of said petition eight per cent of the legal voters in such county. * * * The second power is the referendum, and it may be ordered either by petition signed by five per cent of the legal voters of the state: Provided, that two-fifths of the whole number of the counties of the state must each furnish as signers of said petition five per cent of the legal voters in such county, or, by the Legislative Assembly as other bills are enacted. * * * Any measure referred to the people shall still be in full force and effect unless such petition be signed by fifteen per cent of the legal voters of a majority of the whole number of the counties of the state, in which case the law shall be inoperative until such time as it shall be passed upon at an election, and the result has been determined and declared as provided by law. The whole number of votes cast for Governor at the regular election last preceding the filing of any petition for the initiative or referendum shall be the basis on which the number of legal petitions and orders for the initiative and for the referendum shall be filed with the secretary of state. * * * "

The section is not expressed in the clearest and most appropriate language, and is therefore obscure in some respects; but, taken as a whole, we think the purposes sought to be accomplished by its several provisions are not difficult to ascertain. It is clear that, in order to be effective, a petition for a referendum must meet two requirements: (1) It must be signed by five per cent of all the legal voters in the state, taking as the basis for calculating the percentage the whole number of votes cast for governor at the last preceding election; and (2) each of two-fifths of all the counties of the state must furnish as signers five per cent of the legal voters in that county. If each

of two-fifths of the counties have furnished the necessary percentage of signers, but the whole number from these counties does not make five per cent of all the legal voters in the state, the petition may be rendered effective by signers enough from other counties to make up the required percentage of the entire number of legal voters in the state. It will be observed that the distribution of the signers of a petition to initiate a measure and one to order a referendum is the same; the two being different only in the necessary percentage of the whole number of legal voters. These conclusions are made necessary by the plain and explicit terms in which the two provisions are expressed.

When we come to examine the provision relating to the requirements of a petition to suspend the operation of a measure [2] until the people have had an opportunity to approve or reject it, we find it embodies a different plan. A measure referred to the people is in full force and effect as a law unless "such petition be signed by fifteen per cent of the legal voters of a majority of the whole number of the counties of the state." Obviously, under this provision, there cannot be a suspension without a referendum. The expression "such petition" can have reference to nothing other than to a petition signed by a sufficient number of legal voters so distributed as to require the ordering of the referendum. To obtain the suspension, however, the additional requirement is not the signing by fifteen per cent of the legal voters of the state distributed over a majority of the counties of the state, but fifteen per cent of the legal voters of a majority of the whole number of counties of the state. Counsel for the relator insisted that the only way which would harmonize this provision with the referendum provision and give effect to the clear intent of the section that there shall be a larger number of signers to suspend an Act than to refer one was to construe this provision as requiring fifteen per cent of all the legal voters of the state; that is, the provision must be construed as though it read "fifteen per cent of the legal voters of the state and of each of a majority of the whole number of counties of the state." When we note the specific re-

quirement of signatures by fixed percentages of the whole number of voters in the state in both the petitions to initiate and to refer measures, and the omission of this requirement from the suspension provision, the conclusion is unavoidable that the omission was made intentionally, and that it was deemed sufficient to order a suspension if, in addition to the five per cent of the whole number of voters signing the petition for a referendum, there should be enough signers from other counties to make up the required fifteen per cent of the legal voters in each of a majority of the whole number of the counties of the state.

It was entirely within the province of the people in adopting the amendment to make the several requirements as we find them, though it omits to require the signatures of a percentage of all the legal voters in the state to suspend a measure, as it does in case of initiative and referendum petitions, to accomplish their respective purposes. That this is so, however, is no valid reason why this court should conclude that the omission occurred by mistake, rather than that it was made on purpose. The suspension provision being expressed in terms clear and definite, it is not within the province of the court to undertake to harmonize it with the other provisions by interpolating in it words which would give it a meaning substantially different **[3]** from that which it expresses. The same rules apply to the construction of provisions of the Constitution as apply to the construction of statutes. (*State ex rel. Maddox* v. *Kenney*, 11 Mont. 553, 29 Pac. 89; *Dunn* v. *City of Great Falls*, 13 Mont. 58, 31 Pac. 1017.) As we have said, the section, as a whole, is not expressed in the clearest and most appropriate language; **[4]** yet, when we have elicited from it the particular purposes and intentions of its several provisions, taking in their obvious sense the terms in which they are expressed, calling to our aid the ordinary rules of grammar, our task is ended. This is the elementary rule of construction. Other rules may be resorted to only when this fails. (*Jay* v. *School Dist. No. 1*, 24 Mont. 219, 61 Pac. 250, and authorities cited; Cooley's Constitutional Limitations, 7th ed., 89.)

The next contention made was that the petition was not signed by fifteen per cent of the legal voters of each of a majority of the counties of the state. It was conceded by counsel for relator that upon the face of it the petition was in proper form in every respect, and was apparently signed by the required number of legal voters from each of a majority of the counties. It may be remarked in passing that, while we have referred to the petition filed with the secretary of state as one petition, it is in fact made up of one or more petitions from each of the several counties. These, certified by the clerks of the several counties, as required by the statute, and filed with the secretary of state, are taken together as the petition referred to in the Constitution.

Counsel for relator were permitted, over the objection of the attorney general that it was incompetent, to introduce the testimony of the clerks of Wheatland, Treasure and Glacier counties, which tended to show that they had not compared the signatures of certain voters which were attached to the petitions from these counties, to ascertain that they were genuine as provided by the statute in that behalf. For illustration: Wheatland county was created out of portions of Meagher and Sweet Grass counties by an Act of the legislature which became a law on February 22, 1917 (Laws 1917, Chap. 55). At the time the petitions signed by voters in this county were presented to the county clerk for comparison and certification by him, the only registration cards in his office or other records bearing the original signatures of registered voters in that county at the preceding general election were the cards of those who had registered after the creation of the county; all others being copies authorized by the Act creating the county to be made from the original registration books and cards on file with the clerks of Sweet Grass and Meagher counties. It was therefore impossible, as we shall see later, for him to comply technically with the statute. The testimony of the clerks of Treasure and Glacier counties—both created since the election of 1916—was to the same general effect. Counsel insisted that the signatures of

these voters which appeared upon the copies and of those registered since 1916 must be eliminated; that, this being done, the petitions from these counties were upon their face insufficient because the remaining signatures represented less than fifteen per cent of the legal voters of these counties; and that hence these petitions should not be considered for any purpose, with the result that there were left petitions from only twenty-four of the fifty counties in the state, or less than a majority of the whole number.

Section 108 of the Revised Codes prescribes the duties of the [5, 6] county clerk in any county in which a petition is signed and those of the secretary of state in determining the sufficiency of it when filed in his office. A brief epitome of this section, so far as is pertinent here, is the following: The clerk is required to compare the signatures of those signing a petition with their signatures on the registration books and blanks on file in his office, "for the preceding general election," and, after doing so, to attach to the sheets of the petition containing the signatures his certificate to the secretary of state showing substantially that he has made the comparison as directed; that he believes the signatures of the signers, setting forth their names and numbers, are genuine; that, as to the remaining signatures thereon, he believes that they are not genuine, stating the reason; and, further, that these names, giving a list of them, do not appear on the registration books and blanks in his office. "Every such certificate shall be *prima facie* evidence of the facts stated therein, and of the qualifications of the electors whose signatures are thus certified to be genuine, and the secretary of state shall consider and count only such signatures on such petition as shall be so certified by such county clerks to be genuine." There is added a proviso that this officer may consider and count such of the other signatures as may be proven to be genuine, and that the parties so signing were legally qualified to sign. The proof must be by the official certificate of a notary public of the county in which the signers reside. It further prescribes the form of certificate to be made by the notary, and

directs that, before the secretary of state counts the names certified by any notary, he shall verify the official seal and signature of the notary. None of the signatures believed by the clerks not to be genuine were certified by a notary, as might have been done.

Referring to the initiative and referendum amendment, *supra*, it will be noted that the only qualification the signers of an initiative or referendum petition must have is that they be legal voters. In view of the fact that, though one who possesses the qualifications of citizenship, age, residence, *etc.*, is in a general sense an elector, and is not entitled to vote unless he has been registered a citizen who is not registered is not a legal voter. If he is registered he is a legal voter, and, by the terms of the amendment, is qualified to sign an initiative or referendum petition. The legislature, therefore, transcended its power in requiring the clerk to compare the names of the signers with their signatures on the registration books and blanks on file in his office "for the preceding general election." This method of comparison would exclude from consideration all young men and women who had become of age after the last general election, though they had registered, as well as all others who for any reason had not registered until after the election and thus become legal voters. The legislature was without power to exclude this class and prevent them from exercising all the rights of other legal voters who had registered prior to the election. Therefore the clerks of the several counties were correct in certifying to the secretary of state the names of all signers as genuine whose names appeared upon the books and blanks in their respective offices as registered voters, whether they had voted at the prior election or not.

There was thus made out a *prima facie* case calling for the ordering of a suspension of the amendment to the primary law, and this made it the duty of the secretary of state, under section 109, Revised Codes, to notify the governor that the petition bearing the required number of signers had been filed in his office. This *prima facie* case could not be overcome and the

suspension of the amendment to the primary law be made nugatory only by allegation and proof that a sufficient number of signatures to the petitions from Wheatland, Treasure and Glacier counties, or at least to the petitions from two of them, were not genuine, to require their exclusion from the count. Assum-
[7] ing that the allegations in the affidavit were sufficiently specific to justify the admission of evidence on this point, that introduced by counsel for the relator did not tend to impeach the genuineness of the signatures attached to any one of the petitions in question. It tended merely to show that the clerks had not technically pursued the directions of the statute in ascertaining the number of legal voters who were entitled to sign the petition. This is not the complaint made by the relator. Even so, we should be slow to reach a conclusion by which any legal voter would be prevented from exercising a clear constitutional right by a mere irregularity in the performance of his duty by a public officer.

For these reasons we regarded the application of relator as without merit, and hence set aside the alternative writ and dismissed the proceeding.

ASSOCIATE JUSTICES HOLLOWAY, HURLY, MATTHEWS and COOPER concur.

HARVEY, RESPONDENT, v. TOWN OF TOWNSEND ET AL., APPELLANTS.

(No. 4,107.)

(Submitted February 27, 1920. Decided March 22, 1920.)

[188 Pac. 897.]

Cities and Towns—Special Improvement Districts—Complaint—Jurisdiction of Council—Resolution of Intention—Sufficiency—Notice—Objections—Date of Hearing—Statutes—Damages—Waiver.

Cities and Towns—Special Improvements—Damages—Complaint—Presentation of Claim not Required.

1. Plaintiff, in an action to recover back a special improvement tax paid under protest, need not allege in the complaint that his claim had been presented to the city or town council for allowance before action was commenced, section 29 of Chapter 89, Laws of 1913, under which Act the improvements were made, not contemplating presentation thereof as a condition precedent to his right to maintain the action.

Same—Special Improvements—Council—Jurisdiction—How Acquired.

2. To acquire jurisdiction to create a special improvement district and order the proposed improvement, the council must pass a resolution of intention to create the district, give the required notice, and hear and determine protests, if any.

Same—Resolution of Intention—Sufficiency.

3. A resolution passed by the town council reciting the creation of an improvement district and that the resolution should be deemed one of intention to create, and creating it, followed by a description of its boundaries and of the character of the proposed improvements, with an estimate of the cost, *etc.*, and that objections to its creation and the final adoption of the resolution would be heard in a certain place at a given time, *held* to have been in substantial compliance with statutory provisions.

Same—Notice of Intention—Purpose of Reference to Resolution.

4. The purpose of the reference in the notice which must be given by the council of its intention to create a special improvement district, to the resolution of intention is to designate to interested parties the source of information from which to ascertain the description of the property to be included in the proposed district.

Same—Property Owners Chargeable With Notice of What.

5. Since property owners in a proposed special improvement district are chargeable with knowledge that the resolution of intention to create a special improvement district is required to be on file in the town clerk's office and to contain a particular description of its boundaries, failure of the notice mentioned above to refer to the resolution for a description of such boundaries is insufficient to vitiate the proceedings.

Same—Date of Hearing Objections—Statutory Provision Directory.

6. The provision of section 5, Chapter 89, Laws of 1913, that objections to a proposed special improvement shall be heard at the next regular meeting of the city council after the expiration of the fifteen days in which protest can be made, *etc.*, is directory only.

Same—Adjournment of Hearing—Estoppel.

7. A property owner whose right to protest against the creation of a special improvement district was foreclosed by failure to act within the fifteen days prescribed by the statute could not complain that the council, instead of hearing the protest at the first regular meeting after expiration of the time fixed, heard it at a later date.

Same—Overruling of Protests—What Sufficient Evidence.

8. Where the record showed a protest to a proposed special improvement, and that after hearing it the resolution was passed and approved by the mayor, the action of the council was sufficient evidence that the protest was overruled.

Same—What is Competent Evidence of Publication of Notice.

9. The affidavit of the publisher of a newspaper that notice of intention to create a special improvement district was published, as well as the papers containing it, are admissible and sufficient evidence to prove publication.

Same—Ordering Improvement—Special Resolution not Required.

10. The passage of the resolution creating a special improvement district constitutes a sufficient order for the making of the contemplated improvements, in the absence of a provision in Chapter 89, Laws of 1913, requiring a special resolution to that effect.

Same—Damages—Waiver.

11. By failure of an objecting property owner to give notice of defects or irregularities in the proceedings to the council within sixty days after the contract for the work is let, he waives all claim for damages, under section 13 of Chapter 89, Laws of 1913.

Appeal from District Court, Broadwater County, in the Fourteenth Judicial District; R. Lee Word, a Judge for the First District, presiding.

ACTION by W. W. Harvey, against the Town of Townsend, a municipal corporation, and B. Williams, Treasurer of Broadwater County. From a judgment for plaintiff, defendants appeal. Reversed and remanded, with directions to enter judgment dismissing the complaint.

Mr. Edward Horsky, for Appellants, submitted a brief; *Mr. Thos. E. Davis*, of Counsel, argued the cause orally.

Mr. E. H. Goodman, for Respondent, submitted a brief.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1913 the town council of the town of Townsend assumed to create special improvement district No. 7 for the purpose of constructing cement sidewalks, curbing, culverts, and doing the necessary grading in the district, and thereafter assumed to levy a tax upon the property in the district to pay for the work which was then completed. Plaintiff, the owner of real estate within the district, paid under protest his tax demanded in 1914, and within sixty days thereafter commenced this action to recover it back and to have the entire tax, in so far as it affected his property, declared to be void. He prevailed in the lower court, and defendants appealed from the judgment.

1. Appellants contend that the complaint does not state a cause of action, in that it fails to allege that plaintiff's claim [1] was presented to the council before this action was commenced, and *Leggat* v. *City of Butte*, 54 Mont. 137, 168 Pac. 38, is cited in support of the contention. The *Leggat Case* arose under the provisions of sections 3367–3429, Revised Codes. The proceedings out of which this action arises were had under Chapter 89, Laws of 1913, and section 29 of that Chapter authorizes an action to recover a tax paid under protest and clearly contemplates that presentation of a claim to the city or town council is not a condition precedent to the right to maintain the action. Sections 3283 and 3288, Revised Codes, are general in their nature, whereas section 29, above, is a special statute applicable to this particular character of action, and no such statute was in existence at the time the *Leggat Case* arose so far as we are able to determine. For this reason the observations made in that case are not applicable here.

2. The trial court held that the town council did not acquire jurisdiction to create special improvement district No. 7, and the correctness of that conclusion presents the principal question here involved.

To acquire jurisdiction to order the proposed improvement [2] it was necessary that the council: (1) Pass a resolution of

intention to create the district; (2) give the required notice; and (3) hear and determine the protest, if any. (*Shapard* v. *City of Missoula*, 49 Mont. 269, 141 Pac. 544.)

(a) The record discloses that on July 17, 1913, the council passed a resolution, the portions of which material to a disposition of this controversy follow:

"Be it resolved by the council of the town of Townsend:

"Section 1. That a special improvement district to be known [3] and designated as Special Improvement District No. 7, be and the same is hereby created and this shall be deemed a resolution of intention to create and creating such improvement district, for the purpose of making improvements in portions of the townsite of the town of Townsend as is more fully described in the boundaries of said improvement district in the next section, by the installing of cement sidewalks, curbs, crosswalks, culverts and parking and grading."

Then follows a description of the boundaries of the proposed district and of the character of the proposed improvements, with an estimate of the cost, *etc.* The resolution then concludes: "Objections to the creation of the said district and to the final adoption of this resolution for the creating that district will be heard at the council chambers in the town of Townsend on August 19, 1913, at 8 o'clock P. M."

We think this record discloses a substantial compliance with the provisions of the statute in so far as the resolution of intention is concerned (*Allen* v. *City of Butte*, 55 Mont. 205, 175 Pac. 595), and distinguishes this case from *Cooper* v. *City of Bozeman*, 54 Mont. 277, 169 Pac. 801.

(b) The notice given by the council was published and posted for the prescribed time and was mailed to the property owners affected, as required. It contained a sufficient description of the proposed improvement. (*Mansur* v. *City of Polson*, 45 Mont. 585, 125 Pac. 1002.) It contained an estimate of the cost and designated the time when and the place where the council would hear and pass upon protests. It did not, however, contain a specific reference to the resolution for a description of the bound-

aries of the proposed district. The resolution of intention must describe the boundaries of the district (sec. 3, Chap. 89, above), and must be kept in the office of the city or town clerk (secs. 3253 and 3265, Rev. Codes, and sec. 3, Chap. 89, above). The [4] purpose of the reference in the notice to the resolution is to designate to interested parties the source of information from which to ascertain the description of the particular property to be included in the proposed district. (*Johnston* v. *City of Hardin*, 55 Mont. 574, 179 Pac. 824.) The particular phraseology [5] of the notice is not prescribed. The notice in question contains a reference to the resolution by number, defines the purpose of the council in creating the district, and describes in very general terms the property to be affected. Since everyone was chargeable with knowledge that the resolution was on file in the town clerk's office and that it contained a particular description of the boundaries of the proposed district, the failure of the notice to refer specifically to the resolution for a description of the boundaries ought not to vitiate the proceedings, particularly in view of the concluding sentence of section 13. The property owners within the district were chargeable with the very knowledge that the notice would have imparted had it followed the language of the statute in the most minute detail. (*Michael* v. *City of Mattoon*, 172 Ill. 394, 50 N. E. 155; 2 Page & Jones on Taxation by Assessment, sec. 750.)

(c) The council designated August 19, as the time for hearing protests. Section 5 of Chapter 89, above, allows fifteen days [6, 7] after the first publication of the notice within which property owners may make objections. The objections must be in writing and filed with the clerk. The section further provides: "At the next regular meeting of the city council after the expiration of the time within which said protest may be so made, the city council shall proceed to hear and pass upon all protests so made." The record discloses that the notice was published first on July 19, and that the next regular meeting of the council after the expiration of the fifteen-day period fell on August 12; but, since plaintiff did not present any protest in

writing within fifteen days from the first publication, or at all, he cannot complain that the hearing was had at a date later than it might have been had. He was not deprived of any right; for his right to protest was already foreclosed by his failure to act within the time allowed by law for such purpose. Although the statute designates the next regular meeting of the council after the expiration of the time for presenting protests as the time for the hearing, it is manifest that this provision is directory only; for by the concluding sentence of section 5, above, authority is given to the council to adjourn the hearing from time to time.

(d) The record discloses further that a hearing was had on August 19; that but one property owner, C. H. Lefever, pro- [8] tested; that the resolution was placed upon final passage and passed and approved by the mayor. This action of the council furnishes sufficient evidence in itself that the protest of Lefever was overruled.

(e) Finally plaintiff insists that there was not presented any [9] competent evidence that the required notice was ever published. The real question was whether the notice was in fact published. The affidavit of the publisher would have been sufficient evidence of the fact of publication (section 7993, Rev. Codes), but it was not the only evidence admissible for the purpose of proving the fact. The newspapers themselves containing the published notice and introduced in evidence in this case were competent for the purpose of proving the ultimate fact with which the court was concerned. (17 Cyc. 496.)

The council, having passed a sufficient resolution of intention, [10] having given the required notice, and having heard and determined the only protest presented, acquired jurisdiction to order the improvements made. (Sec. 6, Chap. 89, above.) The statute does not require the council to pass an independent resolution ordering the improvements to be made. The passage of the resolution creating the district constituted a sufficient order for the proposed improvements. The record discloses further that a contract for the work was let, and that plaintiff failed

[11] within the next sixty days thereafter to give notice of any defects, errors or irregularities in the proceedings of the council, or that his property would be damaged by the making of the improvements; and section 13 of Chapter 89, above, provides: "All objections to any Act or proceeding or in relation to the making of said improvements, not made in writing and in the manner and at the time aforesaid, and all claims for damages therefor, shall be waived by such property owner: Provided the notice of the passage of the resolution of intention has been actually published and the notices of improvements posted, as provided in this Act."

We think the trial court erred in holding that improvement district No. 7 was not created legally, and that the tax imposed upon plaintiff's property is void.

The judgment is reversed and the cause is remanded, with directions to enter judgment dismissing the complaint.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY and COOPER concur.

MR. JUSTICE MATTHEWS, being disqualified, takes no part in the foregoing decision.

STATE EX REL. WOODWARD, RELATOR, v. MOULTON ET AL., COUNTY COMMISSIONERS, RESPONDENTS.

(No. 4,567.)

(Submitted March 1, 1920. Decided March 22, 1920.)

[189 Pac. 59.]

Mandamus—New Counties Act—Constitution—Exclusion Petitions—Insufficiency—Constitutional Law—Unequal Taxation—Statutes—Legislative Proceedings—Extent of Review.

Mandamus—New Counties—Board of County Commissioners—Availability of Writ.

1. *Mandamus* lies to compel the board of commissioners of a county from which the greater portion of a proposed new county is intended to be taken to reconvene and take jurisdiction of the proceeding, where its refusal to proceed was based upon an erroneous decision of purely preliminary questions of law.

New Counties—"Taxpayer"—Definition.

2. A "taxpayer" within the meaning of section 2 of the New Counties Act (Chap. 226, Laws of 1919) which requires petitions for the creation of a new county to be verified by five resident taxpayers, is one who owns property within the county and who pays, or is subject to and liable for, a tax.

Same—Taxpayer—Failure to Place Name on Tax-roll—Effect.

3. Where the owner of personalty listed it and paid taxes thereon, failure of the assessor to place his name on the tax-roll, or the fact that the property was mistakenly assessed in the name of a newspaper of which he was the owner, did not have the effect of disqualifying him as a "taxpayer" as above defined.

Same—Exclusion Petition—"Block"—Insufficiency.

4. *Held*, that the requirement of Chapter 226, Laws of 1919, that territory sought to be excluded from a proposed new county must be in one block—the word "block" implying solidity or compactness—was not met by a petition describing an irregularly shaped tract distributed over fourteen townships, the exterior boundaries of which ran back and forth, in all directions of the compass, alternately including and excluding small tracts, so threaded together as to preserve its continuity, and including those against the creation of the new county and excluding those favoring it.

Same—Exclusion Petition—Majority Rule.

5. The intent of the legislature in enacting the provision that territory sought to be excluded from a proposed new county must be in one block, *held* to have been that a block should be mapped out, irrespective of the personnel of those residing within it, the majority of the residents thereof to determine whether, as a whole and not as individuals, they go with the new or remain in the old county.

Same—Defective Exclusion Petition.

6. Where the territory described in an exclusion petition filed in a proceeding to create a new county left certain tracts in the proposed new county contiguous to the remainder of the old county, but entirely

surrounded by exclusion territory and segregated from the remainder of the new county, such tract should have been included in the exclusion petition.

Same—Expense of Preliminary Proceeding—Constitution—Unequal Tax Burdens.

7. Failure to make provision for reimbursement of the county from which the greater area for a proposed new county is taken for the expense incident to the creation of the new county, *held* not to render Chapter 226, Laws of 1919, violative of section 11 of Article XII of the Constitution, as casting an unequal burden of taxation upon the old county.

Statutes—Irregularity in Legislative Proceedings—Extent of Review of Journals.

8. Under the rule that where the constitutionality of an Act is questioned on the ground of irregularity in its passage, the only purpose for which courts may go behind the enrolled bill is to ascertain whether the aye and no vote was entered in the journals of the legislative assembly, it is not permissible to determine whether an amendment to a bill made by a joint conference committee was considered by either house before passage upon third reading.

Original application for *mandamus* by the State, on the relation of Herbert S. Woodward, against B. F. Moulton and others, as members of the Board of County Commissioners of Fergus County. Writ granted.

Mr. O. W. McConnell, Mr. John J. Jewell and *Mr. Earl Wineman*, for Relator, submitted a brief; *Mr. McConnell* argued the cause orally.

Messrs. Belden & De Kalb and *Mr. Ralph J. Anderson*, for Respondents, submitted a brief; *Mr. H. L. De Kalb* argued the cause orally.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

On the twenty-fifth day of November, 1919, relator, with 584 other persons, filed with the respondent board two petitions, one from Cascade county and one from Fergus county, for the creation of a new county to be known as Judith Basin county. These petitions contained a statement of all facts required by law and necessary to confer jurisdiction upon the board to act; thereupon a day was fixed for the hearing of the petitions, and notice given and proof made of the publication as required by

law, and a cash bond in the sum of $5,000 was furnished. Thereafter, and within the time allowed by law, certain petitions were filed with the board for the exclusion of territory within the boundaries of the proposed county, and other petitions for the inclusion of certain other territory.

On the day of the hearing, protestants against the creation of the proposed county challenged the sufficiency of the verification of the Cascade county petition, on the ground that one of the signers, H. S. Thurston, was not a taxpayer. This matter was argued, testimony taken thereon, and taken under advisement by the board. The board heard the evidence as to the sufficiency of the petition from Fergus county and of the exclusion petitions Nos. 1 and 3, and thereafter determined that H. S. Thurston was not a taxpayer, and therefore the petition from Cascade county was insufficient, and rejected the same. The board then found that the territory described in exclusion petitions Nos. 1 and 3 was each in one block, and contiguous to Fergus county, that the petitions were sufficient, and excluded the territory so described, and found that inclusion petition No. 1 was insufficient, and that inclusion petition No. 2 was filed on the day of the hearing, and therefore came too late, and rejected both of said petitions for the inclusion of territory. Thereupon the board found that, with the exclusion of the territory described in exclusion petitions Nos. 1 and 3, the remainder of the proposed county would not be reasonably compact, and the petition for the creation of the county was therefore denied.

The board further found that all petitions filed constitute one attempt to create a county, and that, upon the failure of one of the petitions to comply with the law—that is, the Cascade county petition—the board was without authority to proceed, and also that, the Cascade county petition having failed, the remaining territory in the petition for the creation of the new county contained less than ten hundred square miles, excluding the territory withdrawn by reason of exclusion petitions Nos. 1 and 3.

Relator thereupon filed his petition for a writ of mandate to compel the respondent board to reconvene and annul their order

holding that the Cascade petition was not properly verified, and to annul their order finding exclusion petitions Nos. 1 and 3 sufficient, and their order that the proposed new county did not contain the required area, and to make findings of all facts required by law to be determined, and give notice and order an election for the creation of Judith Basin county. An alternative writ was issued, and the board made return thereto, and also filed a motion to quash.

1. In support of the last-named motion, it is urged that the [1] board, having acted in a *quasi*-judicial capacity, and having exercised their discretion, the writ of mandate does not lie. This question has long since been determined adversely to the contention of respondents. "The rule that *mandamus* will not issue to control discretion or to revise judicial action, but only to direct the court to act in such matter, is to be understood as applying only to the act to be commanded by the writ, and not to the decision of purely preliminary questions of law only." (*Raleigh* v. *District Court*, 24 Mont. 306, 81 Am. St. Rep. 431, 61 Pac. 991; *State ex rel. Stringfellow* v. *Board of County Commrs.*, 42 Mont. 62, 111 Pac. 144; *State ex rel. Arthurs* v. *Board of County Commrs.*, 44 Mont. 51, 118 Pac. 804; *State ex rel. Lang* v. *Board of County Commrs.*, 48 Mont. 28, 134 Pac. 297.)

2. The Act providing for the creation of new counties requires [2, 3] that "There shall be attached and filed with said petition or petitions an affidavit of five qualified electors and taxpayers residing within each county sought to be divided," *etc.* (Sess. Laws 1919, p. 561, sec. 2.)

The petition from Cascade county was rejected by the board of county commissioners of Fergus county, on the ground that one H. S. Thurston was not a taxpayer. The evidence discloses that Thurston did not appear on the tax-rolls of Cascade county for the year 1919. It does appear, however, that Thurston listed with the assessor, watches, jewelry, *etc.*, of the value of $100, household goods and furniture of the value of $500, and manufacturing and mining machinery of the value of $1,800,

and, in the blank affidavit attached to the assessment list, the name of H. S. Thurston appears, although the assessor entered on the flat leaf or cover of the list, the name "Geyser Times." Thurston testified that he was the owner of the property described, and signed his name to the list on demand of the deputy assessor, as making oath thereto, and that the name of "Geyser Times" did not appear on the list at the time. He further testified that he paid the taxes by his personal checks; that he is a resident of Cascade county, and voted at the last general election; that he is the owner of the "Geyser Judith Basin Times," and that there is no incorporated company.

It will be noted that the section of the Act above referred to does not require that the affiant shall be a taxpayer "whose name appears on the last assessment-roll of the county," as is the case in many such statutory provisions, but merely that he is a "taxpayer." "'A taxpayer' is one who owns property within the municipality, and who pays a tax, or is subject to and liable for a tax." (*City of Pocatello* v. *Murray*, 23 Idaho, 447, Ann. Cas. 1914C, 1050, 130 Pac. 383; *Lasityr* v. *City of Olympia*, 61 Wash. 651, 112 Pac. 752; *State ex rel. Sutton* v. *Fasse* (Mo. App.), 71 S. W. 745.) In the *Pocatello Case* the court said that, as the statute did not require the name of the taxpayer to appear on the assessment-roll, the ownership of the property and the payment of taxes thereon were sufficient to qualify such owners of property as taxpayers. We think this is the correct rule, and that it is abundantly supported by the authorities. Thus in *State* v. *Lowe*, 56 Kan. 594, 44 Pac. 20, it was held that "The failure of an assessor to enter the name of a taxpayer on the rolls, when it was his duty to have done so, does not disqualify him as a juror."

"The fact that the property is assessed in the name of another by mistake does not disqualify a person as a juror if he is the owner of the property and pays taxes thereon." (*United States* v. *Hackett* (C. C.), 29 Fed. 848.)

And in the case of *Mayer* v. *Sweeney*, 22 Mont. 103, 55 Pac. 913, it was held that "Under Political Code, section 4749, which

requires the mayor * * * to be a 'taxpaying freeholder,' a person who, at the time of his election, owned and paid taxes on personalty, and owned realty on which he was not liable for taxes for that year, because acquired since the date of assessment, is eligible.''

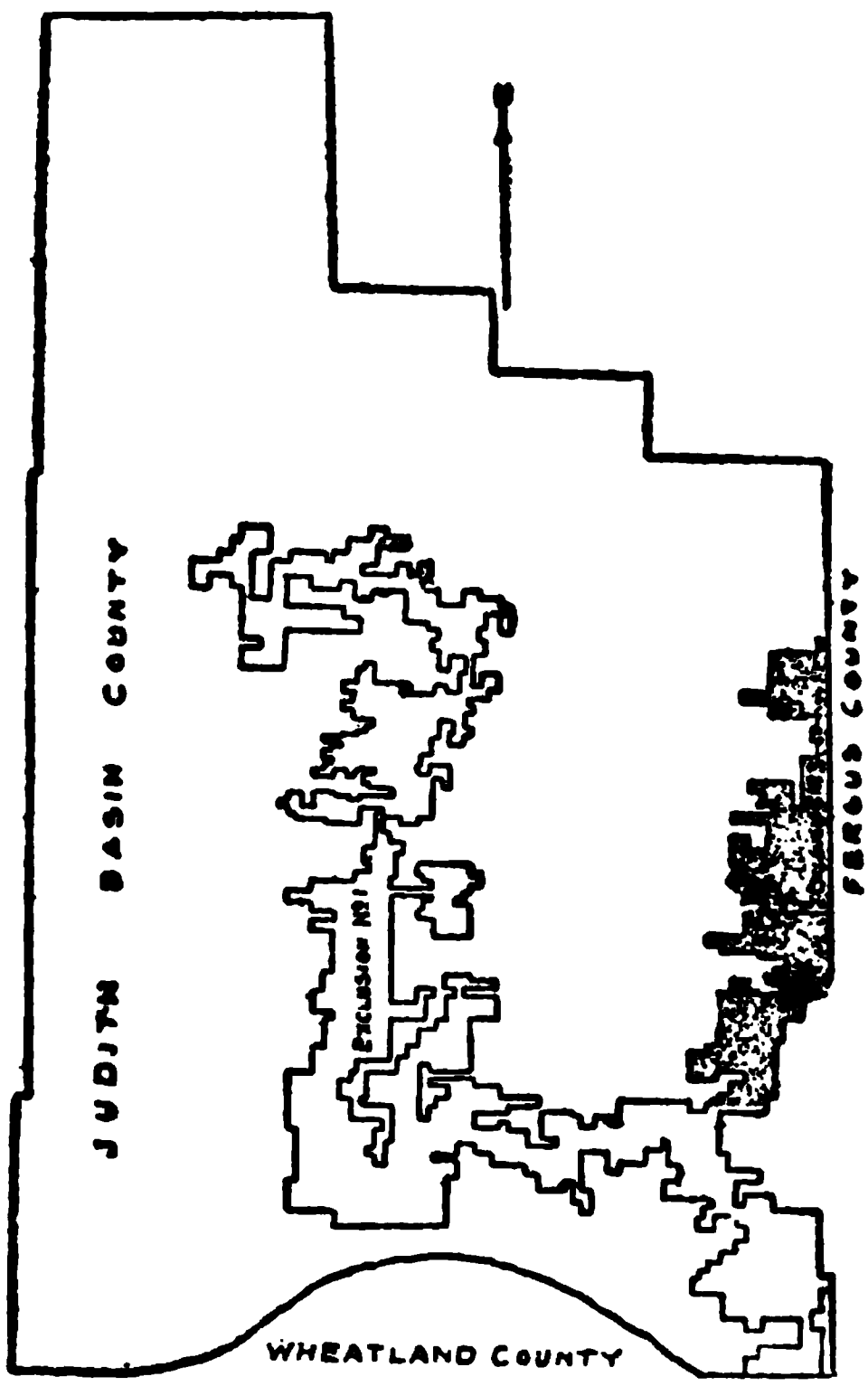
It is clear that Thurston was a qualified elector and taxpayer, and that the petition from Cascade county was therefore sufficient in this respect. It is not necessary to pass upon the question as to whether the petition could be amended by a further verification before final hearing.

3. The next error assigned is that the board of county commissioners found that the petition for Judith Basin county was not sufficient, for the reason that, after certain withdrawals, it contained less than twelve hundred square miles. The board was evidently laboring under a misapprehension of the provisions of the Act. Section 1 provides that the creation of a new county must not reduce the original county to less than twelve hundred square miles in area, but the new county need not contain more than ten hundred square miles. This error was, at some time before the hearing, corrected in the original findings by striking out the word ''twelve'' and substituting the word ''ten.''

4. With reference to exclusion petitions, the Act (section 2), [4] provides that: ''All such territory being excluded must be in one block, and contain an area of not less than thirty-six square miles, and be totally within one county, and contiguous thereto. * * * ''

In exclusion petition No. 1, the description of the lands to be excluded covers ten and one-half pages of typewritten matter, single spaced, comprising an area of 143 1/32 square miles, distributed over fourteen townships and with an exterior boundary line of 305 miles. In length it is thirty-one miles and is twenty-one miles wide. The exterior boundary line runs back and forth, north, east, south, west, alternately, including and excluding small tracts of land. In places the excluded land is, for a mile or more, not to exceed a quarter of a mile in width. A conception of the condition existing can only be acquired by

reference to the map introduced in evidence, a copy of which is made a part of this opinion.



This remarkable collection of tracts of land, threaded together to preserve its continuity, was declared by the respondent board to be "in one block." The word "block" is defined to be: "A section or division; the objects collectively contained in a section; a mass or row, as a block of land; the land and buildings contained in a single square; a government division of land." (Standard Dictionary.) "A lump or mass; any solid mass or matter * * * a connected mass of buildings." (Century Dictionary.) "A solid mass of wood or stone, usually with one or more plain surfaces; a square; a portion of a city inclosed by streets." (Webster's Dictionary.) Throughout all

the definitions of the word runs the one thought of solidity or compactness.

Prior to the passage of the present law, there was no requirement that excluded territory should be "in one block," and it is quite evident that the legislature, by inserting the clause in the present law, intended to place an additional restriction upon those desiring to exclude territory from a proposed county, by providing that those desiring to withdraw shall carve from the proposed new county not less than thirty-six square miles in some regular and compact form and contiguous to the remaining portion of the original county, and then ascertain whether a majority of those residing in such "block" of land were favorable to the exclusion, to the end that, after the exclusion, county lines could be run between the original and the new counties in a practicable and workable manner. It is, of course, conceivable that such "block" of territory might be so extensive as to entirely divide, or at least emasculate, the proposed county; and the legislature, therefore, further provided that the board shall determine whether the area left in the proposed county will be reasonably compact.

But it was clearly not intended that, with regard only to continuity, running the lines so as to include those against the creation of the county and carefully excluding all in its favor, [5] territory could be excluded. If such had been the intention, there was no occasion for the provision that such a petition should contain the signatures of a majority of those residing within the territory sought to have excluded. This is a government by majority rule, and it was intended that a whole block or tract be mapped out irrespective of the personnel of those residing within it, and thereupon the majority of such residents should determine whether they, as a whole, go with the new or remain in the original county. Counsel urge the right of "self-determination," but self-determination in this respect means nothing more than the right of the majority to determine—not determination by each individual.

While exclusion petition No. 3 described territory with [6] irregular boundary lines, it is less objectionable than is No. 1; but here certain tracts, contiguous to the remainder of the county of Fergus, are left entirely surrounded by exclusion territory, and, if the exclusion petition is granted, in the anomalous position of being a part of the new county, yet entirely segregated therefrom. To have been effective, this exclusion petition should have taken in all such tracts, so that both the exclusion petition and the new county petition could have been effective.

5. The respondents have set up in their answer, and urge as [7] grounds for their motion to quash the alternative writ the contention that the New County Act (Chap. 226, Laws of 1919) is unconstitutional and void, in that it violates section 11 of Article XII of the state Constitution, which provides: "Taxes shall be levied and collected by general laws and for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax"—the contention being that, as the hearing on the petition shall be had before the board of county commissioners in the county from which the greater area is taken, and no provision is made for the reimbursement of such county, either from the new county when created, or *pro rata* from the other counties from which territory is taken, a burden is cast upon the taxpayers of such county in violation of the above-quoted article of the Constitution.

While the requirement that the one county shall be charged with the entire expense of the hearing on the petition may be an injustice to that county and the other counties from which territory is carved should pay their proportionate shares of such expense, as a matter of justice between the counties, such provision does not come within the prohibition of the article referred to. Article XII of the Constitution has to do only with the levying and collection of taxes to maintain the state and county governments, and has no relation to the expenditure of the moneys so raised. The funds from which these expenses shall

be paid are raised by a uniform levy upon the same class of subjects within Fergus county, including the property proposed to be taken into the new county of Judith Basin. The fact that all the property in Cascade county will escape taxation for this purpose does not destroy the uniformity of the taxation in Fergus county. An analogous situation is the levy of a uniform tax for road and bridge purposes on all property in the county, and the expenditure of a large sum in one section of the county, while all sections have contributed their proportionate share to the fund. The building of an expensive piece of road, or the erection of a costly bridge in one end of the county, may be of no benefit whatever to property in the opposite end of the county, and yet there is no violation of the uniform taxation rule laid down. This is an entirely different proposition from that dealt with in the case of *Hamilton* v. *Board of County Commrs.*, 54 Mont. 301, 169 Pac. 729.

As to defraying the expense of the election, excepted to by respondents, the Act provides for an apportionment between the old counties; here the use of the funds is for a public purpose, and the property in the new county, if created, has stood its proportionate share of the taxes from which the fund is derived, and will be charged with its proportionate share of the debt of each of the counties from which it is carved.

6. Respondents contend that the Act under consideration is [8] void and of no force and effect, for the reason that, while it was being considered as Senate Bill No. 6, it contained the provision, "Nor shall any line thereof pass within eighteen miles of the courthouse, * * * " which provision was changed by the joint conference committee to read "fifteen" instead of "eighteen" miles, and that the committee was without authority to make the amendment, or, if acting within its authority, the amendment was not considered by either house before its passage upon third reading of the bill. We are asked to go behind the enrolled bill as approved, and determine the regularity or irregularity of the proceedings of the legislature from the senate and house journals.

The question of the authority of the court to proceed in the manner suggested in determining the constitutionality of an Act of the legislature has been three times before this court:

In the case of *State ex rel. Bray* v. *Long*, 21 Mont. 26, 52 Pac. 645, it was contended that a certain bill was not passed by the legislative assembly in the manner prescribed by the Constitution; the journal omitted to show that the bill in question was signed by the presiding officer of each house, pursuant to the provisions of section 27, Article V, of the Constitution. The court, in refusing to go behind the enrolled bill, said: "The presumption is that the legislature and the officers thereof did their duty, and that the enrolled bill was regularly passed. This presumption is strong, and is indulged in by the judicial branch of the government as necessary to the 'peace and good order of the state.' * * * "

Quoting from *Railroad Co.* v. *Governor*, 23 Mo. 353, 66 Am. Dec. 673, the court continues: "If the legislature exceeds its power in the enactment of a law, the courts being sworn to support the Constitution, must judge that law by the standard of the Constitution, and declare its validity. But the question whether a law on its face violates the Constitution is very different from that growing out of the noncompliance with the forms required to be observed in its enactment. In the one case a power is exercised not delegated, or which is prohibited. * * * In the other, the law is not in its terms contrary to the Constitution; on its face it is regular, but resort is had to something behind the law itself in order to ascertain whether the General Assembly, in making the law, was governed by the rules prescribed for its action by the Constitution. This would seem like an inquisition into the conduct of the members of the General Assembly, and it must be seen at once that it is a very delicate power, the frequent exercise of which must lead to endless confusion in the administration of the law."

The next case to consider this question is that of *Palatine Ins. Co.* v. *Northern Pacific Ry. Co.*, 34 Mont. 268, 9 Ann. Cas. 579, 85 Pac. 1032, and the latest case that of *State ex rel. Gregg*

v. *Erickson,* 39 Mont. 280, 102 Pac. 336. In the later case Mr. Justice Holloway reviewed at length the authorities on the question and laid down the following rules: "In the case of *Marshall Field & Co.* v. *Clark,* 143 U. S. 649, 36 L. Ed. 294, 12 Sup. Ct. Rep. 495, [see, also, Rose's U. S. Notes], * * * the court held to the strict English rule, and said: 'We are of opinion, for the reasons stated, that it is not competent for the appellants to show, from the journals of either house, from the reports of committees, or from other documents printed by authority of Congress, that the enrolled bill designated "H. R. 9416," as finally passed, contained a section that does not appear in the enrolled Act in the custody of the state department.' * * * In *Palatine Ins. Co.* v. *Northern Pacific Ry. Co.,* * * * this court departed from the rule theretofore announced in *State ex rel. Bray* v. *Long,* * * * and held that the courts might consult the legislative journals to determine whether, upon the final passage of a bill in either house, the names of those voting had been entered on the journal. We felt constrained to go to that extent because of the language of section 24, Article V, of our Constitution, which provides: 'No bill shall become a law * * * unless on its final passage the vote be taken by ayes and noes, and the names of those voting be entered on the journal.' Section 12, Article V, of our Constitution requires that each house shall keep a journal of its proceedings; but, except in these instances where the Constitution requires a specific entry to be made in the journals, the question what entries shall be made, or how full or minute the entries made shall be, are questions addressed to the legislative discretion. (*State* v. *City of Hastings,* 24 Minn. 82.)

"There are but two instances mentioned in our Constitution wherein the legislature is required to make any particular entries in the journals. The first is found in section 24 above, and the other in section 27 of the same Article, where the fact of the signing of a bill by the presiding officer is required to be entered upon the journal. But for the failure of this second entry to be made, there is not any declaration that any conse-

quences would follow; whereas, there is the specific declaration made in section 24 that, if the names of those voting upon the final passage of a measure be not entered in the journal, the bill shall not become a law. But for the obligatory character of this language, this court, in the *Palatine Case* above, would have followed the rule theretofore announced in *State ex rel. Bray* v. *Long*." The court concludes with the declaration: "We deem the argument advanced in *Marshall Field & Co.* v. *Clark*, above, in favor of the English rule, conclusive upon this subject, excepting in so far as that rule is modified or added to by the provisions of section 24 of our Constitution above."

It is therefore apparent that, when the constitutionality of an Act is questioned on the ground of irregularity of legislative action, the only purpose for which the courts may examine the journals of that body is to determine whether the ayes and noes vote was entered.

The writ should issue to the members of the respondent board of county commissioners of Fergus county, directing them to reconvene within fifteen days after service of the writ and annul their order made on the fourteenth day of January, 1920, denying the petition herein; declaring affiant Thurston not a taxpayer, and that the Cascade county petition is insufficient, and annul their finding and order that exclusion petitions Nos. 1 and 3 are sufficient and excluding the territory therein described, and to thereupon, by proper order, reject said exclusion petitions Nos. 1 and 3 as insufficient in law, and find that the said Cascade petition was properly verified, as a matter of law, and that they do proceed to hear and determine, and make such further findings and pass such resolutions and make such orders as are required of them by law; and it is so ordered.

Writ forthwith.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

FAGAN, RESPONDENT, v. SILVER, APPELLANT.

(No. 4,113.)

(Submitted March 1, 1920. Decided March 22, 1920.)

[188 Pac. 900.]

Nuisances — Injunction—Stone Quarries—Liability of Owner and Lessee—Independent Contractors.

Nuisance—Stone Quarry Within City Limits.

1. Where, in an action to enjoin the operation of a rock quarry and rock-crusher in the residential part of the city, the evidence showed that in spite of precaution taken in their operation rocks escaped and were thrown against plaintiff's house and the concussion from blasting was so violent as to shake the house, and dust from the crusher and elevator entered the house in such quantities as to render it unfit for habitation, the maintenance of a nuisance was established.

Same—Liability of Lessor and Lessee.

2. One who erects a nuisance on his premises cannot escape liability by leasing them, his liability extending to the continuance of the nuisance after the lease goes into effect; the lessee also being liable if he continues the nuisance after notice of its existence and notice to abate it.

Same—Independent Contractor—Liability of Owner.

3. The owner of a stone quarry and crusher, constituting a nuisance, cannot escape liability for damage to adjoining property by contracting for their operation by an independent contractor, who was to deliver the crushed rock in bins, for the use and benefit of the owner, at a stipulated price per yard.

Appeal from District Court, Silver Bow County in the Second Judicial District; George B. Winston, Judge for the Third District, presiding.

ACTION by William F. Fagan against Joseph Silver and others. From a judgment for plaintiff, and from order denying a new trial, defendant Silver appeals. Affirmed.

Mr. Francis A. Silver, for Appellant, submitted a brief and argued the cause orally.

The contract in this case was to do a lawful thing, which, if done in a proper manner, would be reasonably safe for the

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For authorities passing on the question of liability for injury to person or property from concussion caused by blasting, see notes in 12 L. R. A. (n. s.) 389; 27 L. R. A. (n. s.) 425; L. R. A. 1915E, 356.

The question of liability for injury for blasting when done by independent contractor is discussed in notes in 14 L. R. A. 830; 65 L. R. A. 753, 854.

owners of property in the neighborhood. If it was not so done, no liability attaches to appellant. (*Ferguson* v. *Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544; *Wabash etc. Ry. Co.* v. *Farver*, 111 Ind. 195, 60 Am. Rep. 696, 12 N. E. 296; *Atlanta etc. R. Co.* v. *Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231, 13 S. E. 277; *Harrison* v. *Kiser*, 79 Ga. 588, 4 S. E. 320; *Cuff* v. *Newark etc. R. Co.*, 35 N. J. L. 17, 10 Am. Rep. 205; *Peachy* v. *Rowland*, 13 Com. B. 182; *Painter* v. *Pittsburgh*, 46 Pa. St. 213, 220; *Hilliard* v. *Richardson*, 3 Gray (Mass.), 349, 63 Am. Dec. 743; *Eaton* v. *European etc. Ry. Co.*, 59 Me. 520, 8 Am. Rep. 430; *Sweeny* v. *Murphy*, 32 La. Ann. 628; *Frassi* v. *McDonald*, 122 Cal. 400, 55 Pac. 139; *Moore* v. *Townsend*, 76 Minn. 64, 78 N. W. 880; *Skelton* v. *Fenton etc. Power Co.*, 100 Mich. 87, 58 N. W. 609; *Bailey* v. *Troy etc. R. Co.*, 57 Vt. 252, 52 Am. Rep. 129; 21 Am. & Eng. Ency. of Law, 717; Bishop on Noncontract Law, 606; Addison on Torts, 644.)

When property, not a nuisance when leased, becomes so only by the act of the tenant while in possession, the owner is not liable. (*Joyce* v. *Martin*, 15 R. I. 558, 10 Atl. 620; *Rankin* v. *Ingwersen*, 49 N. J. L. 481, 10 Atl. 545; *Jessen* v. *Sweigert*, 66 Cal. 182, 4 Pac. 1188; *Shindelbeck* v. *Moon*, 32 Ohio St. 264, 30 Am. Rep. 584; *Wolf* v. *Kilpatrick*, 101 N. Y. 146, 54 Am. Rep. 672, 4 N. E. 188; *Harris* v. *Cohen*, 50 Mich. 324, 15 N. W. 493; *City of St. Louis* v. *Kaime*, 2 Mo. App. 66; *Norton* v. *Wishall*, 26 Barb. (N. Y.) 618; Hay on Liability for Accidents, 66; Shearman & Redfield on Negligence, sec. 501.)

Mr. L. J. Hamilton and *Mr. John A. Shelton*, for Respondent, submitted a brief; *Mr. Shelton* argued the cause orally.

The plaintiff contends that under the evidence detailed the liability of Silver may be predicated on at least six different well-settled rules of law as follows: (1) Everyone who in any way contributes to the maintenance of a nuisance is liable; (2) One who creates an incipient nuisance is liable for its maintenance by another under contract with him to do so; (3) The landlord who receives rent knowing, or being in a position to

know with the exercise of reasonable care that a nuisance is being maintained on his premises, is liable; (4) One who leases property for a purpose which must prove injurious or offensive to others, under ordinary circumstances, is liable; (5) One who would otherwise be held to be an independent contractor is not such if he performs the work contracted to be done with means and instrumentalities furnished by the contractor; and (6) One who plans certain work, the doing of which according to the plan will likely create a nuisance, unless preventive measures are adopted, cannot escape liability merely by contracting with another to do such work according to such plan. (Sec. 832, Wood on Nuisances; Thompson on Negligence, secs. 623, 646; 29 Cyc. 1202; Jones on Landlord & Tenant, sec. 603; Joyce on Nuisances, sec. 473; *Anderson* v. *Dickie*, 26 How. Pr. (N. Y.) 105; *Robinson* v. *Smith*, 53 Hun, 638, 7 N. Y. Supp. 38; *Longley* v. *McGeoch*, 115 Md. 182, 80 Atl. 843.) The case of *Board of Chosen Freeholders* v. *Woodcliff Land Imp. Co.*, 74 N. J. L. 355, 65 Atl. 844, was a case of the same character as this one, and the landlord as well as the tenant was held liable, although the landlord did nothing whatever toward the actual maintenance of the nuisance.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This action was commenced against Silver and others to enjoin the operation of a stone quarry and rock-crusher in a residential portion of the city of Butte. The cause was tried to the court without a jury, and resulted in judgment for respondent and the issuance of a permanent injunction against Silver and one William Mackey; motion was made for a new trial and denied, and appeal taken by Silver alone from the judgment and from the order denying the motion for a new trial.

While there are a number of specifications of error, the whole question presented thereby is as to whether the evidence was sufficient to warrant the court's findings and injunction order as against this appellant. It is not contended that the evidence

was not sufficient as far as Mackey was concerned, but it is urged that, as the evidence establishes the existence of the relation of landlord and tenant between appellant and Mackey, or that Mackey was an independent contractor, appellant was improperly joined in the injunction order.

The undisputed testimony is that appellant was the sole owner [1] of the lots on which the quarry was situated, and of the crusher, elevator, bins and other machinery used, and that he placed the plant in position and condition to be operated, and thereupon turned it over to Mackey under an agreement whereby Mackey was to conduct all operations and deliver the crushed rock in the bins, for the use and benefit of appellant, at a stipulated price per yard. Appellant personally removed the crushed rock from the bins, and was therefore frequently in the vicinity of the plant while in operation, and had operated it himself some two or three years before, in approximately the same position and with like results. There is no evidence in the record as to any agreement, or as to the manner in which Mackey should conduct his operations, or as to what steps, if any, he was to take for the protection of adjoining property; however, the testimony on behalf of Silver and Mackey, jointly, tends to show that all precautions possible in the then condition of the plant were taken. Respondent's testimony shows that, in spite of such precautions, rocks did escape and were thrown against his house, the concussion from blasting was so violent as to shake the house, and that dust from the crusher and elevator entered in such quantities as to render it unfit for habitation. Such evidence clearly established the maintenance of a nuisance. (*Longtin* v. *Persell*, 30 Mont. 306, 104 Am. St. Rep. 723, 2 Ann. Cas. 198, 65 L. R. A. 655, 76 Pac. 699.)

If we consider the facts as applying to the relation of [2] landlord and tenant, appellant cannot escape liability, for the following rules would apply: "One who erects a nuisance on his premises cannot escape liability by leasing the same, and his liability extends to the continuance of the nuisance after the lease goes into effect." (29 Cyc. 1202; *Anderson* v. *Dickie*, 26

How. Pr. (N. Y.) 105; *Robinson* v. *Smith*, 53 Hun, 638, 7 N. Y. Supp. 38; *McCarrier* v. *Hollister*, 15 S. D. 366, 91 Am. St. Rep. 695, 89 N. W. 862.)

"Where there has been a nuisance of continued existence upon demised premises, the lessor and the lessee may both be liable for the damages resulting therefrom—the lessee in the actual occupation of the premises, if he continues the nuisance after notice of its existence and request to abate it; and the lessor, if he first created it, and then demised the premises with the nuisance upon them, and at the time of the damage resulting therefrom is receiving a benefit therefrom by way of rent or otherwise." (Jones on Landlord & Tenant, sec. 603.)

On the other hand, if we take the view that Mackey was an [3] independent contractor, it is equally true that appellant cannot escape liability. While the case of *Holter Hardware Co.* v. *Western Mortgage Co.*, 51 Mont. 94, L. R. A. 1915F, 835, 149 Pac. 489, was an action for damages, the principle involved is the same, and the rule there laid down is controlling in this case. There damages resulted from débris, which the contractor had failed to remove, being carried by a high wind on to adjacent property. The owner of the building from which the débris came, sought to evade liability on the ground that the damage was caused by the negligence of an independent contractor, and, in disposing of the matter, this court said: "The contention that Groseclose was solely responsible, upon the theory that he was an independent contractor and created the condition which resulted in the accident, is without merit for two reasons: In the first place, the contract did not impose upon him the duty to remove the débris from the skylight, or to leave the building in a safe condition. By not imposing this duty upon him, Kleinschmidt, the manager, became responsible for the performance of it. Negligence in this behalf was chargeable to him and the corporation. In the second place, the corporation, the owner of the property, in arranging to have repairs done upon it, the installment of which would probably result in creating a condition dangerous to neighboring property owners, was under obli-

gation to provide that reasonable care should be taken to obviate the probable consequences. As was pointed out in *Railroad Co.* v. *Morey*, 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. 269, a proprietor's liability 'is based upon the principle that he cannot set in operation causes dangerous to the person or property of others, without taking reasonable precautions to anticipate, obviate, and prevent these probable consequences.' Under this rule, an employer may not divest himself of the primary duty he owes to other members of the community by contracting with others for the performance of work, the necessary or probable result of which is injury to third persons.''

Appellant contends that finding No. 5 is erroneous, because based on evidence stricken from the record. While some such evidence was, as pointed out, stricken, the same testimony was permitted to go in without objection on another occasion.

We find no error in the record. The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

STATE EX REL. THOMPSON, RELATOR, *v.* DISTRICT COURT ET AL., RESPONDENTS.

(No. 4,570.)

(Submitted March 3, 1920. Decided March 22, 1920.)

[188 Pac. 902.]

Prohibition—Scope of Writ—Default Judgments — Vacation.

Judgment—When Void.

1. A judgment is void only when upon inspection of the judgment-roll it is apparent that the court either did not have jurisdiction or has committed an act in excess of its jurisdiction.

Default Judgment—Vacation—When Error.

2. Vacation of a decree of divorce, rendered upon default after publication of summons, on the ground of fraud on the part of plaintiff,

after a lapse of more than fifteen months from its rendition, *held* error, defendant's remedy being an action in equity to set the decree aside on the ground stated.

Prohibition—Scope of Writ.

3. The office of the writ of prohibition is primarily to arrest proceedings, but when a case arises in which there are orders to be annulled and proceedings to be stayed, it will, upon a proper showing, annul all prior orders and stay such further proceedings as may be necessary to make the remedy complete.

[As to the nature of the writ of prohibition, see note in 111 Am. St. Rep. 930.]

Original application for writ of prohibition by the state of Montana, on the relation of Andrew Thompson, to restrain the District Court of the Fourteenth Judicial District in and for the County of Meagher and E. H. Goodman, Judge thereof, from proceeding further in a certain action. Writ ordered to issue.

Messrs. Miller, O'Connor & Miller and *Mr. Harry H. Austin*, for Relator, submitted a brief; *Mr. Austin* argued the cause orally.

Mr. E. E. Lofgren and *Mr. Earl V. Cline*, for Respondents, submitted a brief; *Mr. Lofgren* argued the cause orally.

MR. JUSTICE COOPER delivered the opinion of the court.

Andrew Thompson, the relator in this proceeding, on the third day of August, 1918, commenced an action for divorce against Inga Thompson by filing a complaint in the district court of the fourteenth judicial district of the state of Montana in and for Meagher county. In his complaint he alleged that he had been, continuously for a number of years immediately prior to the filing of the complaint, a citizen and resident of Montana; that the defendant had deserted him, and at all times theretofore had been a permanent resident of the kingdom of Norway, and had never been within the United States or the state of Montana to live with him as his wife. It is admitted that copies of the summons and complaint in the divorce action were, on the third day of August, 1918, mailed by the clerk of the district court, directed to Inga Thompson, at Egersund, Norway, and received by her there on October 20, 1918; that service of sum-

mons was had by publication once each week for four successive weeks in the "Meagher County Republican," a newspaper published at the city of White Sulphur Springs, in Meagher county, pursuant to statute; and on September 20, 1918, the defendant, Inga Thompson, having made no appearance, default was on that day taken against her, and a decree of divorce rendered by Honorable John A. Matthews, then the judge of said court, and duly entered.

It appears that on January 2, 1920, Inga Thompson, through her brother Carl Klawson, her attorney in fact, represented by E. E. Lofgren, Esq., an attorney at law, appeared, presented, and filed in that action, under its caption and title, "an affidavit or bill and motion to set aside the said default and to vacate the said decree, and praying for a temporary restraining order," upon which the district court made an order that the plaintiff, Andrew Thompson, show cause on January 30, 1920. in the courtroom in the city of White Sulphur Springs, Meagher county, why an order should not be made setting aside the default, vacating said decree, enjoining relator from transferring any of his property pending the final determination of said action, and requiring him to pay into court a suitable sum for alimony, support and maintenance of defendant during the pendency of the action, and also for attorney's fees. On January 6, 1920, copies of said affidavit and order were duly served, and on January 30, 1920, a hearing was had thereon, at which the court overruled a motion to strike from the files the written affidavit of Carl Klawson; vacated the default and set aside the judgment of divorce; permitted the filing of defendant's proposed answer denying the plaintiff's charge of desertion; ordered relator to pay "within thirty days from that date the sum of $100 as suit money," and continued in force the temporary order enjoining the transfer or other disposition of his real or personal property pending the action. Upon this state of facts, a writ of prohibition, restraining the district court of Meagher county and Honorable E. H. Goodman, the judge thereof, from proceeding further in said action, is asked.

The relator's contention is that the inquiry here is to be confined to an inspection of the judgment-roll; that the evidence disclosing matters extrinsic to the judgment is incompetent, and a proper application of the provisions of section 6589 of the Revised Codes only is involved. The respondents assert that the decree of September 20, 1918, was obtained through the fraud, misrepresentation and concealment of plaintiff; that the summons served by publication was insufficient to meet the requirements of section 6522 of the Revised Codes; and that the respondents had jurisdiction to make the order.

The judgment-roll contains the complaint, the summons, with the sheriff's return of nonservice attached thereto, proof of its publication, the evidence of mailing by the clerk, and the decree awarding the relator a divorce.

Section 6520 of the Revised Codes provides for service of the summons by publication when the defendant resides out of the state. Section 6521 directs how publication shall be made. Section 6522 provides that if service be had by publication, "the summons, in addition to the requirements of section 6515 shall contain a general statement of the nature of the action." Section 6515 directs the manner of publication of summons. If the essential requirements of these Code sections were observed in the proceedings we are asked to review, relief can only be found in an independent action to set aside the judgment for fraud in its procurement.

In *State ex rel. Happel* v. *District Court*, 38 Mont. 166, 129 Am. St. Rep. 636, 35 L. R. A. (n. s.) 1098, 99 Pac. 291, it is said: "Under the statute [Rev. Codes, sec. 6589], the motion in such cases must be made within a reasonable time after the date of the entry of judgment, but in no case exceeding six months, and the statute is the limit of the court's power in such cases. After the expiration of the time limit fixed therein, the power of the court over the judgment absolutely ceases, and it is without jurisdiction to vacate or modify it."

In *State ex rel. Smotherman* v. *District Court*, 51 Mont. 495, 153 Pac. 1019, it was held that because the motion to set aside

the default against a defendant personally served with summons was not made until more than ten months after default had been entered, the trial court was without jurisdiction to set aside the default, and the order was annulled.

The district court had jurisdiction of the divorce action, and, by the provisions of the statute authorizing publication of summons, jurisdiction of the parties, and consequently power to [1] render the judgment. A judgment is void only when upon inspection of the judgment-roll it is apparent that the court did not have jurisdiction. This can only be determined by reference to the judgment-roll; and, unless the record affirmatively shows that the court was without jurisdiction to render the judgment, it is not void on its face. (*Canadian etc. Co.* v. *Clarita* [2] *Co.*, 140 Cal. 672, 74 Pac. 301.) The judgment is fair on its face, obtained in compliance with the statutory steps necessary to its validity, and not susceptible to attack in the original action after the lapse of one year from its rendition. It was error, therefore, to grant the relief on the motion and affidavit. (*Moore* v. *Superior Court*, 86 Cal. 495, 25 Pac. 22; *Jacks* v. *Baldez*, 97 Cal. 91, 31 Pac. 899; see, also, *Dyerville Mfg. Co.* v. *Heller*, 102 Cal. 615, 36 Pac. 928; *Wharton* v. *Harlan*, 68 Cal. 422, 9 Pac. 727.) The remedy of the aggrieved party in the premises must be in a new action to set the decree aside for fraud. A court of equity, under its general jurisdiction, has full authority to afford that relief upon a proper showing.

Counsel, however, insists that the order complained of was properly made because the judgment is void on its face, in that the published summons therein did not contain "a general statement of the nature of the action," under section 6522. It is free of that infirmity, for by a comparison of its language with the mandates of sections 6515 and 6522, it will be seen that their provisions were literally complied with.

The actuating intent of the legislative assembly doubtless had a double aspect: First, to afford relief to a party personally served with process, upon a proper showing of mistake, inadvertence, surprise or excusable neglect, made within six months

after the entry of judgment, order or other proceeding; and, for like reasons to a party served by publication, within one year. Second, where relief is not sought in the original proceeding in the statutory mode, to give the stamp of finality to a judgment standing unassailed for the periods therein specified. It was mindful, however, all the while of the powers of the courts, in the exercise of their equity jurisdiction, to prevent a party from enjoying advantage of an unconscionable adjudication in his favor. (2 Freeman on Judgments, 4th ed., sec. 484a; 1 Black on Judgments, sec. 321.)

The office of the writ of prohibition is primarily to arrest [3] proceedings; but when a case arises in which there are orders to be annulled and proceedings to be stayed, it will, upon a proper showing, annul all prior orders and stay such future proceedings as may be necessary to make the remedy complete. (*Havemeyer* v. *Superior Court*, 84 Cal. 394, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.) Prohibition is therefore the proper remedy. (*State ex rel. Lane* v. *District Court*, 51 Mont. 503, L. R. A. 1916E, 1079, 154 Pac. 200.)

The writ of prohibition will issue, restraining the district court from proceeding further in the premises, with directions to vacate and annul all its orders made and proceedings had in the original action subsequent to the rendition and entry of the judgment therein.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY and HURLY concur.

MR. JUSTICE MATTHEWS, deeming himself disqualified, takes no part in the foregoing decision.

UNION BANK & TRUST CO., RESPONDENT, *v.* HIMMELBAUER, APPELLANT.

(No. 4,528.)

(Submitted February 24, 1920. Decided March 29, 1920.)

[188 Pac. 940.]

Contracts—Promissory Notes—Chattel Mortgages—Liability of Parties—Appeal and Error—Nonappealable Orders.

Appeal and Error—Nonappealable Orders.

1. An appeal does not lie from an order denying a motion for judgment on the pleadings.

Contracts—Liability of Party Signing One of Several Contracts in Same Transaction.

2. Where two or more contracts are known to all the parties to be parts of the same transaction and are delivered at the same time to accomplish an agreed purpose, the party not signing one of the writings cannot escape liability by asserting that he was not a party to all the contracts.

Same—Chattel Mortgages—Promissory Notes—Liability of Person Signing Note but not Mortgage.

3. *Held*, under the above rule, that where a husband and wife delivered at the same time a note and a chattel mortgage securing its payment in order to obtain a loan, the wife doing so with full knowledge of and consent to the entire transaction, she was bound by a stipulation in the mortgage granting the mortgagee the option to accelerate payment of the note whenever it was deemed necessary for the security of the loan, though the instrument did not bear her signature.

Appeal from District Court, Lewis and Clark County; R. Lee Word, Judge.

ACTION by the Union Bank & Trust Company against Anton and Mabel Himmelbauer. From an order denying a motion to discharge an attachment, the last-named defendant appeals. Affirmed.

Messrs. Galen & Mettler, for Appellant, submitted a brief; *Mr. Frank W. Mettler* argued the cause orally.

Is the defendant Mabel Himmelbauer bound by the provisions of a chattel mortgage which she did not sign and to which she was not a party? That a note and a mortgage or other agree-

ment between the same parties, and contemporaneously executed, are to be construed together, is well settled. (8 C. J. 196, note 90.) But it is held that the contemporaneous agreement must be between the same parties as the note itself. Thus, where only one of the makers of a note joins in a mortgage which provided for an accelerating of the maturity date on default of payments, it does not control the time of maturity fixed by the note. (8 C. J. 197, and notes; *Trease* v. *Haggin*, 107 Iowa, 458, 78 N. W. 58.) So far as we have been able to find, the above is the only reported case which appears to have had under consideration the identical question here presented. In the case at bar, Mabel Himmelbauer did not join in the mortgage, and therefore the rule does not apply to her; nor did she in any way consent that the note in suit should become due at any other time than that expressed on its face. Clearly, as to her, no other agreement was ever made than that expressed in the note, and it did not become due as to her until June 17, 1918.

Messrs. Day & Mapes, for Respondent, submitted a brief; *Mr. E. C. Day* argued the cause orally.

The allegations of the complaint are that "the defendants" made, executed and delivered the promissory note sued on; that to secure the payment of the note "the defendants" made, executed and delivered the mortgage. Under this allegation it is not necessary that the appellant should have signed the mortgage. If she, as one of the signers of the note, delivered or gave to the bank the mortgage as further security for the payment of the note, she was a party to the "transaction," and the terms of the mortgage are admissible against her to the same effect as if she had signed it. (Rev. Codes, sec. 5031.)

This section does not require all of the contracts to be signed by all of the parties. It is sufficient if all of the contracts are made as parts of substantially one transaction. The appellant was a party to the note. By delivering the mortgage as security for its payment, and availing herself of the benefits of it, she

thereby makes it a part of the "transaction" to which she was a party. Persons standing in the situation of parties or who are chargeable with notice of the contemporary instruments are bound by their terms, the same as the signers thereof. (8 C. J. 196, sec. 327.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

After the former appeal in this case was determined (56 Mont. 82, 181 Pac. 332), issues were made up between the parties by the answer of the defendant Mabel Himmelbauer to the amended complaint and plaintiff's reply thereto. The statement of the material allegations of the complaint made in the opinion delivered on that appeal is sufficient for the purposes of this appeal and it need not be repeated here.

Defendant's answer contains seven separate defenses, only one of which, with the plaintiff's reply to it, it is necessary to notice. The answer is the following: "(1) That said note described in paragraph 2 of plaintiff's said complaint was not at the time of the institution of the above-entitled action due either in whole or in part as to this answering defendant; (2) that this answering defendant was not a party to the chattel mortgage referred to in paragraphs 4 and 5 of plaintiff's amended complaint and was not bound by the provisions of the clause quoted in paragraph 5 of said amended complaint under which plaintiff alleges it declared said note due and payable on the seventh day of March, 1918; (3) that plaintiff's suit herein was and is as to this answering defendant prematurely brought, and the same should be abated."

The reply joins issue upon all of these allegations, except that it admits: "That the answering defendant was not a party who signed the chattel mortgage."

Upon the filing of the reply the defendant Mabel Himmelbauer moved the court for judgment on the pleadings. The ground of this motion was that it appeared by the admission in the reply that this defendant had not signed the chattel mort-

gage and was not bound by the stipulation contained in it granting the plaintiff the option to accelerate the payment of the note, and hence the action was prematurely brought against her. This defendant also moved the court to discharge the attachment on the same ground. In aid of this motion, Mr. Mettler, one of her counsel, filed an affidavit to which was attached a copy of the chattel mortgage, stating that he was familiar with the facts in the case, that the copy of the mortgage was a true and correct copy of the mortgage referred to in the pleadings, and that there was no other on file or in existence to which the above-named plaintiff and the defendant were or are parties. The court heard the motions together and denied both of them. This appeal is by defendant Mabel Himmelbauer from the order denying the motion to discharge the attachment.

One assignment is that the court erred in denying the motion [1] for judgment on the pleadings. There is no appeal from such an order. (Rev. Codes, sec. 6567.) The error of the court in this regard, if it committed error, cannot be reviewed on this appeal.

On the former appeal we held that, under the rule declared by section 5031 of the Revised Codes, the note and mortgage must be considered together, and that, so considering them, the defendant was bound by the stipulation in the mortgage permitting the plaintiff to accelerate the payment of the note upon [2] the happening of the conditions stated in the mortgage. Counsel for the defendant now insist that, since it appears by the admission in the reply that the defendant did not sign the mortgage, the district court was clearly in error in denying the motion. They cite the case *Trease* v. *Haggin*, 107 Iowa, 458, 78 N. W. 58, as conclusive of this contention. Their argument is that, as the defendant did not sign the mortgage it was not within the power of her codefendant husband to change her obligation to pay the note at any other date than that fixed by the terms of the note itself. We do not question the propriety of the rule as declared in the case cited. There one of the joint makers of two promissory notes had executed a mortgage to the

payee to secure the payment of the notes which contained a stipulation that, if the makers should default in the payment of the principal sums or interest thereon, both of the notes should thereupon become due, and the payee, his heirs or assigns, might proceed to foreclosure. The court held, in effect, that the obligation of one of the joint makers who had not signed the mortgage nor in any way consented to the acceleration of the payment of the notes as provided in the mortgage was to be determined by the terms of the notes themselves; in other words, where two or more contracts related to the same subject matter and were executed at the same time, they could not be considered together as one contract unless they were executed between the same parties. This is the general rule, but it is subject to exceptions, as, for illustration, where two or more contracts are parts of the same transaction, are known to all the parties, and are delivered at the same time to accomplish an agreed purpose. Under such circumstances the party not signing one of the contracts may not escape liability by asserting that he was not a party to all the writings. (*Gammon* v. *Freeman*, 31 Me. 243; *Rogers* v. *Kneeland*, 10 Wend. (N. Y.) 219; *Logan* v. *Tibbott*, 4 G. Greene (Iowa), 389; *MacDonald* v. *Wolff*, 40 Mo. App. 302; 9 Cyc. 581.)

The defendant denies that she signed the mortgage. This is [3] admitted by the plaintiff; but this is not an admission that she was not present and did not join in the delivery of the mortgage in order to obtain the loan from the plaintiff with full knowledge of and consent to the entire transaction. If these were the circumstances surrounding the transaction, the defendant may not be permitted to say that she did not become bound by the stipulation in the mortgage. Her obligation is therefore to be determined by a consideration of all the surrounding circumstances, including the benefit, actual or implied, received by her, and not of the fact alone that she did not join in the execution of the mortgage. It may be that the allegations in the complaint are not sufficiently specific to admit proof of the circumstances, but with the inquiry in this regard we are not now

concerned. As we said in disposing of the former appeal, our "inquiry as to the sufficiency of the complaint may not go further than to ascertain whether the action is upon a contract, express or implied, for the direct payment of money; whether it states facts sufficient to constitute a cause of action against the defendants; and, if it does not, whether it can be amended so as to state a cause of action." If the allegations in the complaint are not sufficiently specific and broad enough to admit proof of the circumstances surrounding the transaction, it is nevertheless amendable, and this brings it within the rule announced on the former appeal.

The order is affirmed.

Affirmed.

ASSOCIATE JUSTICES HOLLOWAY, HURLY, MATTHEWS and COOPER concur.

DUCKETT, APPELLANT, *v.* BIGGS, RESPONDENT.

(No. 4,111.)

(Submitted February 27, 1920. Decided March 29, 1920.)

[188 Pac. 938.]

Conversion—Demand—Refusal—Contracts—Ambiguity — Evidence—Trial—Special Interrogatories—Discretion—Costs.

Contracts—Leases—Ambiguity—Evidence.

1. Where the terms of a lease are ambiguous, the circumstances under which it was made and the intention of the parties in entering into it are proper subjects of inquiry.

Trial—Special Interrogatories—Discretion.

2. Whether special interrogatories shall be submitted in any given case is a question addressed to the sound judicial discretion of the trial court, in the absence of a showing of abuse of which the supreme court will not interfere.

Costs—In Justice's Court—Taxable in District Court.

3. *Held*, that sections 7083 and 7124, Revised Codes, impliedly authorize the district court to tax against the unsuccessful party in that court

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On right of action for negligent breach of gratuitous undertaking, see note in 12 L. R. A. (n. s.) 929, 931.

the costs incurred in the trial of the cause in the justice's court, where they were included in the cost bill, although the justice of the peace had failed to make entry of costs on his docket.

Same—Refusal to Strike—When Proper.

4. Refusal to strike from the cost bill the items "Sheriff's fees in district court, $2.00; in justice court, $6.90," *held* proper as against the contention that they were not set forth with sufficient particularity.

Conversion—Demand for Possession—When Necessary—When not.

5. Demand for possession of personal property wrongfully obtained is not necessary as a condition precedent to the right to maintain an action in conversion; if, however, rightfully obtained, demand and refusal are necessary.

Same—When Demand for Possession and Refusal Necessary.

6. Where by mutual agreement between the lessor of agricultural lands and the lessee grain grown thereon by the latter was stored in the former's granary and mingled with his own, the door locked and kept locked, the lessor was rightfully in possession, and demand by the lessee for the grain and refusal by the lessor were necessary to the maintenance of an action in conversion.

Appeal from District Court, Broadwater County; John A. Matthews, Judge.

ACTION by M. L. Duckett against Moses Biggs. From a judgment for defendant, and an order denying his motion for a new trial made, plaintiff appeals. Reversed and remanded.

Cause submitted on briefs of Counsel.

Mr. Jos. R. Wine, for Appellant.

Mr. Frank T. Hooks, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In this action, commenced in a justice of the peace court, plaintiff sought to recover the sum of $172.11. By his answer the defendant denied the allegations of the complaint and set forth two counterclaims for amounts aggregating $170. The trial in the justice court resulted in a verdict for the defendant, and on appeal to the district court a like result obtained; hence these appeals to this court.

1. Complaint is made of the ruling of the trial court admitting in evidence a lease by the terms of which defendant occupied certain lands belonging to the plaintiff. To sustain his first counterclaim, it was necessary for defendant to show that he was rightfully in possession of the premises at the time his cause of action accrued, or, in other words, it was necessary for him to show that the lease had not expired. By its terms the lease provides that the premises are let to the defendant "to raise one crop of winter grain," and there is no other limitation upon the time for which the lease was to run. Since the terms [1] of the lease are ambiguous, the circumstances under which it was made and the intention of the parties were proper subjects of inquiry. (*Alywin* v. *Morley*, 41 Mont. 191, 108 Pac. 778.)

2. Complaint is made of the refusal of the trial court to submit to the jury a special interrogatory tendered by the plaintiff. [2] Whether special interrogatories shall be submitted in any given case is a question addressed to the sound judicial discretion of the trial court, and, in the absence of a showing of abuse of that discretion, this court will not interfere. (*Rairden* v. *Hedrick*, 46 Mont. 510, 129 Pac. 498.)

3. Although there is not any express statutory provision [3] authorizing the district court to tax against the unsuccessful party in that court the costs incurred in the justice court, the authority to do so is implied clearly from the language employed in sections 7083 and 7124, Revised Codes.

The justice of the peace failed to make the proper entry of costs in his docket, as required by section 7171, Revised Codes; but since no objections were made in that court, and the items were included in the cost bill filed in the district court, plaintiff was not prejudiced in any substantial right.

A motion was made to strike from the cost bill these items: [4] "Sheriff fees in district court, $2.00; in justice court, $6.90," and error is assigned on the refusal of the court to sustain the motion. Counsel for appellant cites in support of his contention *Dewell* v. *Northern Pac. Ry. Co.*, 54 Mont. 350,

170 Pac. 753, but altogether misconceives the purport of the language employed in that case. We said: "The trial court refused to allow plaintiff an item of costs amounting to $1.10 for sheriff's fees and mileage, upon the theory that the cost bill did not set forth the items with sufficient particularity. In this the court erred." For the same reason, the court did not err in refusing to strike out the items above.

4. The principal contention made is that the evidence is in- [5] sufficient to sustain the verdict. The evidence introduced in support of the first counterclaim is sufficient, we think, to make out a *prima facie* case. As a second counterclaim the defendant alleged that plaintiff wrongfully took and converted to his own use a certain quantity of wheat belonging to defendant. The rules of law applicable are well settled in this state, as elsewhere. Whenever, in conversion, the possession of the property in controversy is obtained wrongfully, a demand for its possession is not necessary as a condition precedent to the right to maintain the action. (*Eddy* v. *Kenney*, 5 Mont. 502, 6 Pac. 342; *Reynolds* v. *Fitzpatrick*, 23 Mont. 52, 57 Pac. 452.) The converse is equally true. If the possession was obtained rightfully in the first instance, then a demand and refusal are necessary in order to put the party charged with conversion in the wrong and give rise to the cause of action. (*Scott* v. *Waggoner*, 48 Mont. 536, L. R. A. 1916C, 491, 139 Pac. 454.) The evidence discloses that, by some mutual agreement between the [6] parties, the wheat was stored in plaintiff's granary and mingled with other wheat belonging to him; that immediately thereafter plaintiff locked the door of his granary, and kept it locked; that defendant did not make demand for the wheat, and, to use his own language, did not need it, and was not ready to remove it up to the time this action was commenced and the counterclaim asserted. Under any view of this evidence, plaintiff was rightfully in possession in the first instance; was in effect a gratuitous depositary (sec. 5153, Rev. Codes), against whom no right of action in conversion would arise until defendant

made demand for the wheat and had met with refusal (13 Cyc. 806).

It is impossible to determine from the record whether the jury awarded to defendant the full amount demanded in his second counterclaim, and for this reason a new trial of the cause is necessary.

The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY and COOPER concur.

MR. JUSTICE MATTHEWS, being disqualified, takes no part in the foregoing decision.

KOCH, RESPONDENT, *v.* RHODES ET AL., APPELLANTS.

(No. 4,114.)

(Submitted March 1, 1920. Decided March 29, 1920.)

[188 Pac. 933.]

Fraud—Contracts—Sales of Real Property—Evidence—Admissibility—Right of Action—Waiver—Excessive Verdicts.

Fraud—Sale of Farm Lands—Value—Evidence—Admissibility.

1. Where land and personal property had been sold together for a lump sum, and the buyer brought suit for damages for fraudulent representations with reference to the land only, testimony concerning the value of the personal property was admissible to arrive at the contract price of the land.

On general rule of right to rely upon representations made to effect contract as a basis for a charge of fraud, see comprehensive note in 37 L. R. A. 593.

On purchaser's right to rely on representations made as to title to real property, see note in 39 L. R. A. (n. s.) 1143.

On waiver of fraud by compelling executory contract of sale of personal property after discovering the fraud, see note in 8 L. R. A. (n. s.) 452.

Same—Crops Produced—Fraudulent Statement of Fact—Evidence—Admissibility.

2. A statement alleged to have been made by defendant for the purpose of inducing plaintiff to buy agricultural land, that he (defendant) had never cut less than 200 tons of hay and had cut more, was not a mere expression of opinion but a statement of fact and as such admissible in evidence.

Same—Evidence—Admissibility.

3. To prove the falsity of the statement referred to in paragraph 2 above, plaintiff was rightly permitted to show that the land, though properly cultivated, produced but fifty tons of hay in what was deemed a very good year for hay.

Same—Latitude of Proof Permissible.

4. Where fraud in alleged, great latitude of proof is allowed, and every fact or circumstance from which a legal inference of fraud may be drawn is admissible.

Same—False Representations—Knowledge in Vendor—Evidence—Admissibility.

5. Statements made to a third person by defendant in attempting to secure a loan for plaintiff about the time the contract of sale between the parties was made, tending to show that he knew that representations he had made to plaintiff were false, were admissible, the fact that he acted as agent of plaintiff not rendering them inadmissible.

Same—When Vendee may Rely on Fraudulent Representations.

6. While one intending to buy has no right to rely on representations as to condition, quality, or character of property where the parties stand on an equal footing, the contrary is true where the parties have not equal knowledge, and he to whom the representations are made has no opportunity to examine the property, or where he is fraudulently induced to forego investigation.

Same—Case at Bar.

7. *Held*, under the above rule, that plaintiff was warranted in accepting defendant's representations as to the physical condition of the surface of a meadow where the former was advised by the latter that it would be impossible to inspect it without the use of rubber boots and that none were available, and as to the character of land lying across a river, upon defendant's false assertion that he had no boat at hand to make inspection possible.

Same—*Caveat Emptor*—When Rule not Applicable.

8. The strict rule of *caveat emptor* does not apply where fraud entered into the transaction.

Same—Varying Terms of Writing—Evidence—Admissibility.

9. Where land was described by government subdivisions in the contract of sale, without reference to the number of acres embraced in the tract, evidence of oral representations made to the buyer by the seller, prior to its execution, that it contained a greater acreage than it actually did, was admissible for the purpose of showing fraud in the inception of the contract, and was not objectionable as varying the terms of the writing.

Same—Remedies of Vendee.

10. A party who has been fraudulently induced to enter into a contract may either rescind, or elect to carry it out and recover damages suffered by reason of the fraud, unless he waives such right.

Same—Right of Action—Waiver—Intent.

11. By the affirmance of a contract one may waive his right to rescind as well as his right of action for damages on account of

fraud practiced upon him to induce him to enter into it, but it is only when the intention to waive is clearly manifested that a waiver will be declared.

Same—What Does not Constitute Waiver.

12. *Held*, that plaintiff's action in making a partial payment on the purchase price of the land under an alleged fraudulent contract, after commencement of suit for damages, did not amount to a waiver of his right to recover, where he notified defendant seller that the payment, then due, was made without waiver.

Same—What not Excessive Verdict.

13. A verdict for $2,500 damages for fraudulent representations on a sale of land, the contract price for which was $9,500, *held* not excessive, where eighty acres of supposedly pasture land was covered with slide rock, in addition to a deficiency of forty acres in the acreage, and a difference of 150 tons in the amount of hay per annum between what defendant claimed could be cut and that actually cut.

Appeal from District Court, Missoula County; Asa L. Duncan, Judge.

ACTION by W. E. Koch against George W. Rhodes and another. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Mr. William Wayne and *Mr. Harry H. Parsons*, for Appellants, submitted a brief; *Mr. Wayne* argued the cause orally.

Mr. Chas. H. Hall and *Messrs. Murphy & Whitlock*, for Respondent, submitted a brief; *Mr. A. N. Whitlock* argued the cause orally.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This action was brought to recover damages for the alleged fraudulent representations made by the appellants to respondent in the preliminary negotiations for the sale of real estate and personal property in Missoula county. Appellants are husband and wife.

The real property consisted of two tracts of land, one known as the "home place" and the other as the "timber claim," lying across the Missoula River from the home place. The personal property consisted of farm machinery and livestock used on the

ranch, the contract price for the whole being $9,500, payable $2,000 down, $3,500 on surrender of possession, and the balance in four installments falling due annually, commencing with January 1, 1916. The contract was entered into on June 28, 1915, and respondent took possession on July 11 following, worked the ranch during the summer, and on September 30, 1915, this action was commenced, and thereafter, while the suit was still pending, paid the first note for $1,000 on January 1, 1916. The cause was tried in August, 1916, resulting in judgment being entered on verdict on August 7, 1916, for respondent for $2,500 damages. Motion for a new trial was denied, and appeal taken from the judgment and from the order denying the motion for a new trial.

The complaint alleges that prior to and at the time when the said contract was entered into the defendants personally and through their agent, one Allen Stephens, who was employed by the defendants to assist in selling the said property, for the purpose of inducing the plaintiff and with the intention of deceiving him, made certain false and fraudulent representations regarding the property, the nature of which will be taken up in the discussion of the assignments of error; that each of such representations was untrue; that they were relied upon by plaintiff and were as to material facts concerning the property; that plaintiff exercised ordinary care to ascertain the truth of the statements, but could not, with due diligence or ordinary care, learn that they were untrue, believed the representations and acted thereon, and would not have purchased the property except for such representations; that defendants occupied a position of advantage, had no reasonable grounds for believing that said statements and representations or any of them were true, and in fact knew that they were untrue. The complaint further alleges that the actual value of the property did not exceed $3,500. The answer denies generally and specifically the allegations of fraudulent representations. The appellants make twenty-one assignments of error.

1. Assignments 1 and 2 predicate error on the admission of [1] the bill of sale of the personal property and testimony concerning its value. There is no charge of misrepresentation concerning this property. However, the property was sold at a lump sum. The value of the personal property made up a part of the total purchase price, and, in order to arrive at the contract price of the land, it was necessary first to determine the value of the personal property. The consideration recited in the bill of sale was $10. The bill of sale was therefore admissible to show what property was included, as was the testimony concerning the value of such property.

2. Specifications 3 and 7 are based upon the action of the [2] court in permitting respondent to answer, over objection, the question: "Did he [Rhodes] make any statement as to the amount of hay the meadow would produce?" It is contended that, if such a statement was made, it could be no more than an expression of opinion based on past experience as to the future capabilities of the meadow, and that such a statement could in no event be the basis of a charge of false representation—citing *Butte Hardware Co.* v. *Knox*, 28 Mont. 111, 72 Pac. 301. The holding in the case cited does not support the contention that "in no event" could a statement of an opinion be the basis of such a charge. What Mr. Commissioner Poorman said in the *Butte Hardware Case* was: "Mere expressions of opinion or of judgment do not, except in particular cases, which must be shown by the pleading, constitute actionable fraud or false representations." This condition is met by the pleading in this case and by the proof, and in the case of *Como Orchard Co.* v. *Markham*, 54 Mont. 438, 171 Pac. 274, this court said: "We think the following rule is sustained by reason and the authorities: If the party expressing the opinion possesses superior knowledge, such as would reasonably justify the conclusion that his opinion carries with it the implied assertion that he knows the facts which justify it, his statement is actionable if he knows that he does not honestly entertain the opinion because it is contrary to the facts." (See, also, 12 R. C. L. 254.)

The answer to the question was: "He said he never cut less than 200 tons of hay in any ordinary year; cut over 200 tons. He claimed he cut 236 tons in 1914." Here was no expression of opinion, but statement of facts based on his experience of years on the ranch in question.

It is urged that proof that the same land produced but fifty [3] tons in the season of 1915 was not permissible, and that its admission constituted error. The respondent testified that the year 1915 was a very good year, and that he cultivated the meadow properly. Of course, to be actionable, the statement of Rhodes, if made, must have been false and must have been known by him to be false, or have been recklessly made. It was therefore proper for respondent to prove any facts tending to show the falsity of the statement and to lead to the conclusion that Rhodes knew of its falsity. Testimony as to the yield in the succeeding year, as well as of the yield in 1913, later sworn to be but fifty-five tons, was clearly admissible for this purpose.

Where fraud is alleged, great latitude of proof is allowed, [4] and every fact or circumstance from which a legal inference of fraud may be drawn is admissible. (12 R. C. L. 429, and cases cited.)

3. Under this rule, the action of the court in permitting the [5] testimony of one Wood as to statements made to him by Rhodes in attempting to secure a loan for respondent about the time the contract was entered into was justified. It is contended that the admission of such testimony was error, as the statements were not brought to the attention of Rhodes. This contention is without merit. This was not an attempt to impeach the testimony of Rhodes, but was independent proof of facts tending to show that he knew the falsity of certain statements at the time he made them; nor does the fact that he was at the time acting as agent for respondent render the testimony inadmissible for this purpose.

4. Specification 5 is on proof of the allegation of misrepresen- [6, 7] tation as to the condition of the surface of the meadow;

it being contended that the plaintiff had made two trips to the land and had once sent his wife as his agent to inspect it, and that the representation was made as to a physical condition open to observation. It must be remembered, however, that the testimony discloses that the grass in the meadow was grown up to such an extent that it was impossible to make an examination without going all through the meadow, and that Rhodes advised respondent that it would be impossible to do so without rubber boots, of which he had none at hand. The respondent was justified under the circumstances in relying on the representations made. The facts so appearing take the case out of the rule laid down in the case of *Grindrod* v. *Anglo-American Bond Co.*, 34 Mont. 169, 85 Pac. 891, and *Lukert* v. *Eldridge*, 49 Mont. 46, 139 Pac. 999, and comes within the rule in *Post* v. *Liberty*, 45 Mont. 1, 121 Pac. 475, and *Shoudy* v. *Reeser*, 48 Mont. 579, 142 Pac. 205.

While it is generally held that one has no right to rely on representations as to the condition, quality or character of property where the parties stand on an equal footing, and have equal means of knowing the truth, the contrary is true, however, where the parties have not equal knowledge, and he to whom the representations are made has no opportunity to examine the property, or by fraud is prevented from making an examination. (12 R. C. L. 384, and large number of cases cited.) This is also true where one is fraudulently induced to forego investigation or where the representations are such as to disarm the vigilant, lull his suspicions, and induce him to refrain from making an investigation, or where by trick or artifice he was prevented from making an examination. (12 [8] R. C. L. 375, and cases cited.) The strict rule of *caveat emptor* does not apply where fraud entered into the transaction. (*Post* v. *Liberty, supra; Roberts* v. *Holliday*, 10 S. D. 576, 74 N. W. 1034.)

These rules apply equally to, and dispose of, assignments of error 6, 7, 8 and 10. No. 6 refers to testimony concerning the timber claim across the river. If the testimony of respondent

was to be believed, the appellant Geo. W. Rhodes stated positively that it would be impossible to get across the river; that there was in the neighborhood of eighty acres of bottom land on which timothy, clover and wild peas grew, furnishing pasturage for a large number of cattle, and also timber growing and bunch grass on the hillsides; that he could take his word for it; and it thereafter developed that there was little or no bottom land or pasturage, but a mountainside covered with slide rock, and that he later discovered that Rhodes, contrary to his statement, did have a boat there for the purpose of crossing the river, which statement was allowed to stand, without motion to strike. This evidence was before the jury, and whether they believed the appellant or respondent is outside our inquiry.

5. Assignment No. 10 is to the effect that the court erred in [9] overruling objections to testimony concerning the number of acres in the tract north of the river, the home place, and to the shortage of acreage, on the ground that the written agreement between the parties superseded all prior negotiations, and that this was an attempt to add to a written agreement by parol evidence.

Reference to the written instruments referred to discloses the fact that in none of them is there any reference to the number of acres conveyed. The home place is described by government subdivisions, including fractional lots along the river. The purpose of the testimony was not to vary the terms of the written contract or to add anything thereto, but to show fraud in its inception.

Section 7873, Revised Codes, provides: "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: 1. Where a mistake or imperfection of the writing is put in issue by the pleadings. 2. Where the validity of the

agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 7877, or to explain an extrinsic ambiguity, or to establish illegality or fraud. * * * "

Section 5018 provides: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

Here it is alleged that appellants secured the execution of the contract by fraud; one of the fraudulent representations alleged being that they misrepresented the number of acres of land contained in the home place as 158 acres, exclusive of the railroad and the river, the proof tending to show that there were but 117 acres in the entire tract, and that it had been listed for assessment at 120 acres. It is true that respondent was not seeking to set the contract aside for fraud, but we apprehend that the wording of the statute, "to establish illegality or fraud," is sufficiently broad to bring the case within the exception to the rule, and the great weight of authority supports this position. In the case of *Shoudy* v. *Reeser*, above, such proof was permitted, and its propriety was not questioned by the court.

In *Petit* v. *Sinclier*, 53 Mont. 317, 63 Pac. 467, the contract for the sale of land stipulated for the conveyance of 150 inches of water, and yet the plaintiff was permitted to show, as a fraudulent representation inducing the purchase, a statement that the ranch had "plenty of water." The court, in disposing of the contention that the parol evidence rule was violated, said: "Again it is insisted 'that the written contract, having fixed the amount of water, cannot be varied by parol, and the amount of water or priority is not in issue.' * * * This is a suit to enforce a rescission for fraud inducing the contract; hence the rule invoked does not apply"—citing *Hillman* v. *Luzon Café Co.*, 49 Mont. 180, 142 Pac. 641, and *Sathre* v. *Rolfe*, 31

Mont. 85, 77 Pac. 431. In the *Hillman Case* the court said: "It is urged that no testimony of alleged representations, whether pleaded or not, was admissible because the written contract superseded all prior negotiations between the parties and presumably contains the full text of their agreement. The plaintiffs mistake the full force of defendants' position, which is that the contract was procured by false representations."

In the case of *Kelly* v. *Ellis*, 39 Mont. 597, 104 Pac. 873, relied upon by counsel for appellants, the fraud alleged consisted in an agreement that Kelly should be employed as manager of a company, and the court properly held that, if such an agreement was part of the consideration, it should have been incorporated in the contract.

Wigmore on Evidence, sec. 2439, has this to say on the subject: "In an action for deceit, or in a proceeding of rescission of contract wherever this by the law depends upon the promisor's conscious falsity, the present rule interposes no obstacle." His reason for the exception is that "since the present rule depends on the intent of the parties to embody one or more subjects of transactions exclusively in the document, it is impossible to suppose that the subject of fraud was intended thus to be covered, since by hypothesis the party upon whom fraud is practiced does not know of it, and therefore could not have had such intent." The following cases are cited from the many upholding this exception to the parol evidence rule: *Brown* v. *Le May*, 101 Ark. 95, 141 S. W. 759; *Ashley* v. *Holland* (Tex. Civ. App.), 180 S. W. 635; *Franke* v. *Kelsheimer*, 180 Iowa, 251, 163 N. W. 239; *Ruddy* v. *Gunby* (Mo. App.), 180 S. W. 1043; *Davis* v. *Nuzum*, 72 Wis. 439, 1 L. R. A. 774, 40 N. W. 497. In *Franke* v. *Kelsheimer* the court said: "The rule excluding evidence contradictory of a written instrument does not apply when fraud is the gravamen of the action or gist of the defense." In *Ruddy* v. *Gunby* it is stated that "fraud vitiates everything, and fraudulent representations * * * for the purpose of inducing a party to enter into it are not merged into the contract."

Exception is taken to the giving of certain instructions and to the modification of an offered instruction. We find no error in the action of the court in this instance, and do not consider it necessary to discuss the instructions.

6. Appellants contend that the evidence shows a condonation [10–12] of all fraud and fraudulent representations charged and waiver of all possible right of action for the same, because of the fact that respondent, after the commencement of this action, paid an installment falling due January 1, 1916. It is to be noted in this connection that respondent had been let into possession of the premises on July 11, 1915, and had paid to appellants $5,500; that he had elected to proceed under the contract rather than to rescind it, and sue for damages for the alleged fraudulent representations.

Counsel rely upon the following authorities: *Simon* v. *Shoe Co.*, 105 Fed. 573, 52 L. R. A. 745, 44 C. C. A. 612; *Kingman* v. *Stoddard*, 85 Fed. 740, 29 C. C. A. 413; *Gratz* v. *Schuler*, 25 Cal. App. 117, 142 Pac. 899; *Grindrod* v. *Anglo-American Bond Co.*, above; *Ponder* v. *Altura Farms Co.*, 57 Colo. 519, 143 Pac. 570. The case of *Ponder* v. *Altura Farms Co.* is the only case cited announcing the doctrine contended for, as applied to a contract such as we have under consideration. The first three cases deal with contracts either wholly executory at the time of the discovery of the fraud, or in their nature divisible, depending upon future delivery of commodities.

Under our statutes and under the authorities, one who has been fraudulently induced to enter into a contract has the choice of either rescinding the contract (Rev. Codes, sec. 5063) by restoring or offering to restore what he has received under the contract, and recover what he has parted with, or he may affirm the contract, keeping whatever property he may have received or advantage gained, or sue in an action for deceit for the damages suffered by reason of the fraud. While the affirmance of the contract precludes him thereafter from rescinding, he may still sue for damages, unless he waives that right. (*Como Orchard Co.* v. *Markham*, 54 Mont. 438, 171 Pac. 274.) On the

other hand: "An executory contract which has been procured by fraud is not binding upon the party against whom the fraud has been perpetrated. He may, after discovering the fraud, either perform it or rescind it; and if, with knowledge of the fraud, he elects to perform it, this is equivalent to his making a new contract, and to permit him under those circumstances to recover for fraud would be to do violence to every rule upon which compensatory damages are allowed." (*McDonough* v. *Williams*, 77 Ark. 261, 7 Ann. Cas. 276, 8 L. R. A. (n. s.) 452, 92 S. W. 783.)

In *Thompson* v. *Libby*, 36 Minn. 287, 31 N. W. 52, the supreme court of Minnesota said that to allow recovery under such circumstances "is virtually to allow a man to recover for self-inflicted injuries. The fraud is really consummated, and the damages incurred, by the acceptance of the property and paying for it." This rule was announced in the *Ponder Case*, and followed by the supreme court of Colorado, without, we feel, properly distinguishing between those cases where the contract is still wholly executory and where executed in part. In the case of *Thompson* v. *Libby*, above, the court said: "If the contract be executed in whole or in part before the fraud is discovered, it is well settled that the purchaser need not rescind, but may retain the property, and also bring his action for damages on account of the deceit." This is the rule laid down in *Haven* v. *Neal*, 43 Minn. 315, 45 N. W. 612; *Reger* v. *Henry*, 48 Okl. 759, 150 Pac. 722; *Brustman* v. *Dunn*, 161 Wis. 306, 154 N. W. 361; *Kennedy* v. *Bender*, 104 Tex. 149, 135 S. W. 524; *Minnesota Thresher Co.* v. *Gruben*, 6 Kan. App. 665, 50 Pac. 67; *Talcott* v. *Friend*, 179 Fed. 676, 43 L. R. A. (n. s.) 649, 103 C. C. A. 80; *Waite* v. *Shoemaker & Co.*, 50 Mont. 264, 146 Pac. 736; *Como Orchard Co.* v. *Markham*, above.

And while by an affirmance of the contract one may waive, not only his right to rescind, but also his right of action for the deceit, it is only when such an intention is clearly manifested that such a waiver will be declared. There is a clear distinction between the waiver of the right to rescind and the waiver of

the right of action. This is pointed out by Mr. Cooley in his work on Torts, paragraph 257, as follows: "The fraud may also be waived by an express affirmance of the contract. Where an affirmance is relied upon, it should appear that the party having the right to complain of the fraud had freely and with full knowledge of his right in some form clearly manifested his intention to abide by the contract and waive any remedy he might have had for the deception." The same rule is laid down in 20 Cyc. 93, and cases cited, and in 12 R. C. L. 158, and cases cited.

Here there was not only a lack of facts and circumstances to show clear intention to waive the right of action for damages, but the contrary clearly appeared; for respondent commenced his action before making the payment which is claimed as a waiver, and on making the payment notified appellants that this was done without waiver. It is true that in *Simon* v. *Shoe Co.*, above, it is stated that "he cannot save his right to sue for the fraud by notice that he will do so if he perform and exact performance with full knowledge of the facts which rendered performance nonobligatory"; and it is contended that this rule foreclosed the respondent. However, as heretofore pointed out, the rule in the *Simon Case* applies to those cases where the contract is, at the time of the discovery of the deceit, wholly executory, and not when executed in whole or in part. In order to affirm the contract and pursue his action for damages, it was necessary that respondent make such payments as fell due; for he could not well say that he stood on the contract and at the same time default under the terms thereof.

7. Objection is made as to the testimony introduced on behalf of respondent on the question of the value of the property. While the evidence is not satisfactory or convincing, as read from the record, it was competent testimony, considered by the jury, and cannot be disregarded by the court. In connection with the testimony of Mylander that if, as represented, the property would have been worth $9,000, it would seem that there was no attempt to evade the contract price of $9,500, counsel overlook the fact that

Mylander testified: "I leave out of my estimate of the value of the whole thing the value of the personal property." The personal property had been estimated at $500 or $550; so that Mylander's estimate of the value of the real property at $9,000 would be in conformity with the contract price.

The complaint sufficiently stated a cause of action for deceit. Evidence was introduced which, if believed, established the allegations, and that the jury did believe the evidence produced on behalf of respondents is shown by the fact that a verdict was returned in his favor for the sum of $2,500. The evidence was again reviewed by the trial court on motion for a new trial, and while, as suggested, more than six months elapsed between the time of the entry of judgment and the ruling on motion for new trial, we cannot say that the trial court did not, in the interim, review the evidence, or that such lapse of time would justify the conclusion that the trial judge had entirely forgotten the appearance of the witnesses on the stand or their manner of testifying.

Nor can we say that, if the representations alleged were made [13] and did induce the respondent to enter into the contract, the sum of $2,500 is an excessive award. The difference of over forty acres in the home place and the difference in the production of hay between fifty-five and 200 tons per annum, the condition of the orchard, and the difference in value between eighty acres of pasture land and eighty acres of mountainside covered with slide rock, might well reduce the value of the property from $9,500 to $7,000.

We find no substantial error in the record. The judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

Rehearing denied May 14, 1920.

STATE, RESPONDENT, v. PRLJA, APPELLANT.

(No. 4,416.)

(Submitted March 2, 1920. Decided March 29, 1920.)

[189 Pac. 64.]

Criminal Law—Assault by Police Officer Making Arrest—Concealed Weapons—New Trial—Newly Discovered Evidence—Insufficient Affidavit.

Assault—Police Officer Making Arrest—Concealed Weapons—Statute—Negativing Exception.

1. Where a police officer's defense in a prosecution for assault was that he struck the prosecuting witness on meeting with resistance while attempting to arrest him for carrying a concealed weapon, it was not necessary for him to negative the exception contained in the concealed weapon statute as to permit to carry a weapon.

Same—Concealed Weapons—Cross-examination—Harmless Error.

2. Refusal to permit cross-examination of the prosecuting witness as to whether he had a permit to carry a revolver and whether he knew it was against the law to carry one, if error, *held* harmless.

Same—Police Officer Making Arrest—Criminal Liability for Assault.

3. While, under Revised Codes, section 9064, in making a lawful arrest, the officer may use all necessary means to effect the arrest if the person to be arrested either flees or forcibly resists, if he unnecessarily assaults him he is criminally liable for such assault.

Same—Police Officer Carrying Revolver in Courtroom—Evidence.

4. A police office who carried a gun on his person in the courtroom while on trial for assault was not in a position to complain if prejudiced by the county attorney's question whether he felt it necessary to there carry the weapon, and the court's failure to rule upon his objection.

Same—Appeal—Trial—Objection to Evidence—Question Unanswered—Effect.

5. Where a question to which appellant made objection remained unanswered, he was in the same position as though his objection had been sustained and not entitled to complain.

Same—New Trial—Newly Discovered Evidence—Affidavit by Party Aggrieved Necessary.

6. Where a new trial is asked on the ground of newly discovered evidence, the moving party should show by his own affidavit that the new evidence was not known to him at the time of the trial and could not with reasonable diligence have been discovered and produced by him at that time.

Same—New Trial—Newly Discovered Evidence—Insufficient Affidavit.

7. An affidavit of one of defendant's attorneys in support of a motion for a new trial asked because of newly discovered evidence, to the effect that he could not with reasonable diligence have discovered the affidavits of five persons who claimed to have been present at the place where the alleged assault occurred and whose tes-

timony would tend to contradict the state's witnesses or corroborate appellant's version of the affray "and presented same upon the trial," was insufficient to show abuse of the court's discretion in denying the motion.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

PHILIP PRLJA was convicted of assault in the second degree, and from judgment and order denying his motion for a new trial, he appeals. Affirmed.

Messrs. Canning & Geagan and *Mr. Jos. H. Griffin*, for Appellant, submitted a brief; *Mr. P. E. Geagan* argued the cause orally.

The trial court unduly restricted the cross-examination of the complaining witness Burzan and effectively prevented the placing before the jury of the truth as to all the facts surrounding the occurrence of the acts complained of. This court has held that this right should not be so restricted. (*Cobban* v. *Hecklen*, 27 Mont. 245, 70 Pac. 805; *State* v. *Whitworth*, 47 Mont. 424, 133 Pac. 364; *State* v. *Wakely*, 43 Mont. 427, 117 Pac. 95.)

The affidavits filed in support of the defendant's motion for a new trial conform to all the requirements of law concerning the contents and showing necessary in such affidavits, in order to secure a new trial. (*State* v. *Matkins*, 45 Mont. 58, 121 Pac. 881.) As is shown by them, it was impossible for the defendant at the time of his trial or before to secure the testimony that these affidavits show the affiants were and are able to offer in behalf of the defendant. If the state of facts set forth in the affidavits in support of the motion for a new trial were placed before the jury, as they would be in a new trial, it is indeed very probable that there would be an entirely different result and that the defendant would be acquitted. (*State* v. *Matkins*, *supra*; *Spencer* v. *State*, 69 Tex. Cr. 92, 46 L. R. A. (n. s.) 903, 153 S. W. 858.) The newly discovered evidence is not cumulative merely. It is from and through a source that brings it to

the jury without the legal handicap placed upon the defendant in bringing like evidence before the jury, and the new evidence is all from eye-witnesses wholly independent of the defendant. (Rev. Codes, sec. 7859; *Spencer* v. *State, supra; Green* v. *State,* 6 Ga. App. 784, 65 S. E. 802; *Adams* v. *State,* 55 Fla. 1, 46 South. 152; *State* v. *Townsend,* 7 Wash. 462, 35 Pac. 367; *Holton* v. *State,* 6 Ga. App. 414, 71 S. E. 599.)

Mr. S. C. Ford, Attorney General, *Mr. Frank Woody,* Assistant Attorney General, and *Mr. N. A. Rotering,* County Attorney of Silver Bow County, submitted a brief; *Mr. Rotering* argued the cause orally.

Before the court would have been justified in granting a new trial to the appellant, the latter should have submitted his own affidavit showing that he had no knowledge of any of the witnesses whom he now proposes to produce at the new trial, and further, that he used diligence in attempting to ascertain who were present at the time material to this inquiry. There should also have been submitted affidavits by all of the lawyers who represented the defendant showing that they had no knowledge of any of the proposed new witnesses and that they, and each of them, had used due diligence in attempting to discover who were present at or near the place where the act complained of occurred. (*Smith* v. *Shook,* 30 Mont. 30, 77 Pac. 513; *Nicholson* v. *Metcalf,* 31 Mont. 276, 78 Pac. 483; *Spencer* v. *Spencer,* 31 Mont. 631, 79 Pac. 320.)

MR. JUSTICE MATTHEWS delivered the opinion of the court.

Appellant was convicted in the district court of Silver Bow county of the crime of assault in the second degree, committed upon the person of one Mike Burzan. The trouble out of which the charge arose occurred at the Northern Pacific depot in Butte during the farewell demonstration for departing Servian volunteers. It appears from the evidence that there was considerable shooting done, one witness comparing the disturbance to an old-

time Fourth of July celebration, though there seems to have been no effort to stop it or to arrest those doing the shooting. While Burzan had a gun in his pocket, he took no part in the shooting and his gun remained in his pocket until removed by Prlja at the emergency hospital, later.

Appellant was at the time, and for years prior thereto had been, a police officer, though he was not in uniform at the time of the trouble. Burzan testified that Prlja accosted him with a demand to know why he looked at appellant in the manner he did, and when he answered Prlja struck him over the head with a revolver, then told him he was under arrest, and thereupon took him to the street and called the patrol wagon; that while waiting and while he (Burzan) remained passive, appellant again struck him over the head and shot him twice through the thigh.

Prlja's version of the affair is that he attempted to arrest Burzan for carrying concealed weapons, and so notified him; that he resisted, and it was then that the blow was struck; and that at the time of the shooting Burzan attacked him and bit him on the cheek, and that Burzan's friends were attempting to interfere. Burzan and other witnesses for the state denied that Prlja gave any reason for making an arrest, or that Burzan resisted or bit the officer.

Two separate appeals were taken, the one from the judgment and the other from the order denying appellant's motion for a new trial. But three assignments of error are made, aside from that predicated on the court's denial of the motion for a new trial.

Assignments numbered 1 and 2 urge that the court erred in [1, 2] sustaining the state's objections to the following questions propounded to the witness Burzan on cross-examination:

(1) "Now, you didn't have a permit to carry that gun, did you?"

(2) "You know it is against the law to carry a gun, don't you?"

Counsel for the defense had been permitted to go fully into the question of the witness having a gun on his person at the time, although nothing had been said regarding a gun in the witness' testimony on direct examination, and the fact that Burzan at the time was carrying a concealed weapon was a part of the defendant's case. No objection was interposed to the line of examination until counsel asked the first question set out above.

In order to make out the defense it was not necessary to negative the exception contained in the concealed weapon statute (Laws 1903, Chap. 35) any more than it would have been necessary to charge the same in an information for carrying concealed weapons. (*State* v. *Tully*, 31 Mont. 365, 3 Ann. Cas. 824, 78 Pac. 760; *Territory* v. *Burns*, 6 Mont. 72, 9 Pac. 432.) And the knowledge of the witness as to whether or not he knew that the carrying of a concealed weapon was against the law would not affect the officer's right to make an arrest, if he was in fact violating the law. No attempt was later made to show that the witness had a permit to carry a weapon, and the exclusion of his answers to the questions propounded did not affect the substantial rights of the defendant in the case, whether such exclusion was proper or erroneous. An answer to the first question in the negative would not have aided, while in the affirmative it would have injured, appellant's defense.

While, in making a lawful arrest, if the person to be arrested [3] either flees or forcibly resists, the officer may use all necessary means to effect the arrest (Rev. Codes, sec. 9064), if he unnecessarily assaults such person, he is liable for such an assault (*State* v. *Pugh*, 101 N. C. 737, 9 Am. St. Rep. 44, 7 S. E. 757; 2 R. C. L. 471.)

The question here is, Was the assault made by appellant such as would excuse him? And this question was decided by the jury adversely to appellant's contention. No question is raised as to the sufficiency of the evidence, and we cannot disturb the verdict of the jury.

Specification No. 3 is that the court erred in not ruling upon [4] and sustaining appellant's personal objection to the question of the county attorney, on cross-examination: "Q. Do you feel that it is necessary for you to have a gun on your person in this courtroom?" The defendant did not answer the question, but stated: "Object to the question; it is prejudicial to me." Thereupon the county attorney asked that Prlja be ordered to put his gun away, and the court directed him to turn it over to his counsel. There was no ruling on the question objected to, and consequently no exception taken. It is urged that the interrogation by the county attorney leading up to the question objected to and what transpired immediately thereafter was for the purpose of creating a prejudice against the defendant, and an antagonism toward him, of such a nature as to prevent him from having a fair and impartial trial. If such was the case, appellant brought the condition upon himself by going armed into the courtroom; a man with such experience as an officer as is shown by the record Prlja had should have realized the propriety of laying aside his weapon on entering the courtroom, if, indeed, he had any excuse for bringing it with him to the courthouse where he was to be tried for an assault with a deadly weapon. On discovering that the witness was armed, the county attorney was justified in calling the matter to the attention of the court, and if thereby appellant was prejudiced, he is in no position to complain.

The question to which the objection was directed was not [5] answered, and appellant stands in the same position as though his sole objection had been sustained.

2. The three specifications of error were also urged as ground [6, 7] for a new trial, in connection with certain affidavits filed in support of the motion. These affidavits are made on behalf of appellant by five persons who claim to have been present during some part of the trouble, and tend to either contradict witnesses for the state or to corroborate the appellant's version. In addition to the affidavits of proposing witnesses, there was filed the affidavit of Joseph H. Griffin, as follows:

"State of Montana,
"County of Silver Bow—ss:

"Joseph H. Griffin, being first duly sworn upon oath, deposes and says: That he is now, and during the trial of the action wherein the state of Montana was plaintiff and Philip Prlja was defendant was, one of the attorneys for said defendant, Philip Prlja; that prior to the trial of said action and during the trial of said action affiant did not know of the existence of the evidence set forth in the affidavits of S. N. Price, G. E. Miller, Tom Vucinich, Mrs. D. Aclinovich, and John Boscovich, and affiant could not with reasonable diligence have discovered said affidavits and presented same upon the trial of said action; that the said evidence set forth in said affidavits came to the attention of affiant about one month after the hearing of the above-entitled action.

"JOHN (JOSEPH) H. GRIFFIN.

"Subscribed and sworn to. * * * "

The showing made falls far short of the requisites of such an application, laid down by this and other courts, to entitle a defendant to a new trial. No affidavit is made by the moving party himself; the record discloses that he was represented by two attorneys besides Griffin, and Griffin's affidavit shows that he was but one of the attorneys for Prlja; yet the application contains the affidavit of neither of these attorneys.

A new trial can be granted on the ground of newly discovered evidence only when it appears that the defendant could not with reasonable diligence have discovered and produced it at the trial. (Sec. 9350, Rev. Codes.) Yet the only reference to diligence contained in the entire application is the bald conclusion in the Griffin affidavit that he, as one of the attorneys for defendant, "could not with reasonable diligence have discovered said affidavits and presented same upon the trial," *etc.* It will be noted that the wording of the statute is that "the defendant could not with reasonable diligence have discovered and produced at the trial," and this court has held that "It is fundamental that the moving party must show by his own affi-

davit that the new evidence was not known to him at the time of the trial. Upon that question the affidavits of other persons are not, as a general rule, sufficient." (*Smith* v. *Shook*, 30 Mont. 30, 77 Pac. 513; citing 1 Spelling on New Trial & Appeal, par. 207, and cases cited; Hayne on New Trial & Appeal, par. 92; *Arnold* v. *Skaggs*, 35 Cal. 684; *Nicholson* v. *Metcalf*, 31 Mont. 276, 78 Pac. 483.)

Even when a showing of diligence is made, and made by the moving party himself, the court has scrutinized the affidavit closely; thus, in *In re Colbert's Estate*, 31 Mont. 461, 107 Am. St. Rep. 439, 3 Ann. Cas. 952, 78 Pac. 971, 80 Pac. 248, Mr. Commissioner Clayberg reviewed an extensive showing and stated: "It is well settled that a statement in an affidavit that the party has made inquiry of every person he thought might know anything about the case is insufficient"—citing a number of authorities.

In the case of *State* v. *Matkins*, 45 Mont. 58, 121 Pac. 881, this court said: "Applications for new trials on the ground of newly discovered evidence are not favored by the courts. The reason is that the moving party has already had a hearing after ample opportunity to prepare his case, and that, while smarting under defeat and disappointment, he is under strong temptation to manufacture a plausible showing in support of his motion. He may be entirely willing to take the chances of a new trial, but unwilling or afraid to swear to a statement necessary to procure it. It is often the case that the sense of loss arouses him to the diligent activity which he should have put forth before the trial."

Whether in this case the defendant was "unwilling or afraid to swear to a statement necessary to procure" a new trial, the fact remains that he did not do so and that a showing of reasonable diligence is entirely lacking, and, in these respects at least, the showing is fatally defective.

In the case of *State* v. *Brooks*, 23 Mont. 146, 57 Pac. 1038, the court said: "As has been repeatedly held by this court, a motion for a new trial is addressed to the sound legal discretion of the trial court; and the action of the latter will not be

disturbed, except in an instance manifesting a clear and unmistakable abuse of such discretion. This rule is peculiarly applicable to an application based upon the ground of newly discovered evidence, which not only involves an enlarged discretion in the trial court, but has never been looked upon with favor, but rather with distrust."

There was no abuse of discretion in the action of the trial court in denying the motion for a new trial, and we find no substantial error in the record.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER CONCUR.

STATE, RESPONDENT, v. WEHR, APPELLANT.

(No. 4,507.)

(Submitted March 2, 1920. Decided March 29, 1920.)

[188 Pac. 930.]

Criminal Law—Intoxicating Liquors—Information—Sufficiency—Demurrer—Waiver—Motion in Arrest—Appeal—Technical Errors.

Criminal Law—Information—Demurrer—Waiver—Motion in Arrest.

1. The objection that the information does not state facts constituting a public offense is not waived by failure to demur, but may be raised by motion in arrest of judgment.

Intoxicating Liquors—Sale—Information—"Dispose of"—Sufficiency.

2. *Held*, that an information charging that defendant knowingly, willfully and unlawfully "disposed of" intoxicating liquors was sufficient to state a public offense, though it did not set forth that they were disposed of to some person or entity, the term "disposed of"

For authorities passing on the question as to whether indictment or information for unlawful sale of intoxicating liquor must state name of person to whom sale is made, see note in 23 L. R. A. (n. s.) 581.

in connection with the words qualifying it excluding an act which by law is innocent, and importing a disposition of the liquors to some person or entity as fully as does the word "sale."

Criminal Law—Appeal—Technical Errors.

3. Under Revised Codes, section 9415, the supreme court will not reverse a judgment of conviction on account of technical errors or defects in the information, where defendant was fully advised of the nature of the charge against him to enable him to prepare to meet that charge, and his substantial rights were not affected by the defect.

Appeal from District Court, Hill County; W. B. Rhoades, Judge.

CHRIS WEHR was convicted of unlawfully disposing of intoxicating liquors, and appeals. Affirmed.

Mr. Victor R. Griggs, for Appellant, submitted a brief and argued the cause orally.

The only specification of error and the only question raised by the defendant upon this appeal is that the information upon which the defendant was tried and convicted does not state facts sufficient to constitute a public offense, because the information does not allege that the defendant disposed of intoxicating liquor to any person, persons, association or corporation, it merely stating that the defendant, "unlawfully disposed of certain liquor, to-wit, whisky."

It is a well-settled rule of criminal pleading, that an information must allege every material fact going to constitute the offense charged, with precision and certainty and cannot be aided by intendment. (14 R. C. L., sec. 23; *United States* v. *Cook*, 84 U. S. 168, 21 L. Ed. 538; *United States* v. *Reese*, 92 U. S. 214, 23 L. Ed. 563; *United States* v. *Cruikshank*, 92 U. S. 542, 32 L. Ed. 588; Cook's Criminal Procedure, 155; 1 Bishop's New Criminal Procedure, sec. 646; *State* v. *Keerl*, 29 Mont. 508, 101 Am. St. Rep. 579, 75 Pac. 362; *State* v. *Lester*, 127 Minn. 282, L. R. A. 1915D, 201, 149 N. W. 297.)

Under Chapter 175, Laws of 1917, what are the necessary ingredients of the offense, attempted to be alleged in this action? In order to constitute the offense under this statute as

attempted to be set forth, the defendants must (a) sell, exchange, give, barter or dispose of (b) ardent spirits, or any compound thereof, capable of use as a beverage, or any ale, beer, wine or any intoxicating liquor of any kind, (c) to some person, persons, association or corporation (d) in the state of Montana, and unless all four of the above ingredients are alleged, it is the contention of the appellant that the information is absolutely defective.

The defendant was not charged with "selling," "exchanging," "giving" or "bartering," but was charged with "disposing of certain intoxicating liquors, to-wit, whisky," and was not charged with disposing of certain intoxicating liquors, to any person, persons, or association or corporation, so that one of the principal ingredients, in fact the very gist of the crime of disposing of intoxicating liquor, was not alleged in the information. The gist of this action is not the disposing of the intoxicating liquor in question, but the disposing thereof to some person, persons, or association or corporation.

The fact that the information herein alleges that the defendant "unlawfully" disposed of the intoxicating liquor in question does not make the information sufficient. The supreme court of California in the case of *Going* v. *Dinwiddie*, 86 Cal. 633, 25 Pac. 129, held that where a pleading alleged a certain act to be "unlawful," but omitted in the pleading the facts showing said act to be unlawful, the use of the word "unlawful" does not supply the omitted facts. In the case of *Grant* v. *Williams*, 54 Mont. 428, 171 Pac. 276, this court cites the above case with approval, and says: "The most extravagant use of the terms 'wrongfully' and 'unlawfully' will not relieve the pleader of the necessity of stating facts upon which issues may be joined." Both of these cases are civil cases, and if such a rule is adhered to in civil cases, there is all the more reason for such a rule in a criminal action.

Mr. S. C. Ford, Attorney General, *Mr. Frank Woody*, Assistant Attorney General, and *Mr. Carl E. Cameron*, for the State, submitted a brief; *Mr. Cameron* argued the cause orally.

Must the charge in the information show that the liquor was sold, exchanged, given, bartered and disposed of to some person, persons or association or corporation? A detailed examination of the authorities discloses no cases on the identical question in issue, and the appellant has cited no decision in his brief bearing upon the proposition presented. But there is a case which is nearly parallel with the one at bar, *viz.*, *Winfrey* v. *State,* 133 Ark. 357, 202 S. W. 23. This case is significant in that the words "to any person, firm or corporation" are not considered to be an element of the offense of shipping or transporting alcoholic liquors to any person, firm or corporation in the state, *etc.;* but an offense is charged when the words are used together as "transport and deliver," the act evidently intended to be reached being the transportation for delivery, and when the offense is so charged, it does not constitute a fatal defect in the indictment that the words "to some person, firm, or corporation" were omitted.

Several of the statutes of those states which have adopted prohibition contain provisions similar to section 14 of our Enforcement Act, to the effect that in prosecutions for violation of the liquor laws it shall not be necessary to name the person to whom the sale was made, the constitutionality of which have been questioned and upheld, while the statutes of other states merely provide that it shall be unlawful to sell or otherwise dispose of intoxicating liquors, in the most of which, though there is some conflict of opinion, the rule seems to have been rather uniformly followed that it shall not be necessary to state the name of the person through or by whom the transaction was completed. (*State* v. *Koerner,* 103 Wash. 516, 175 Pac. 175.) This case approves and follows *Fletcher* v. *Commonwealth,* 106 Va. 840, 56 S. E. 149, which uses the following language: "The gist of the offense is the unlawful sale, and the name of the person to whom it was made is immaterial." (See *State* v. *King,* 92 Kan. 669, 141 Pac. 247; *State* v. *Wilbur,* 85 Or. 565, 166 Pac. 51, 167 Pac. 569; *Lea* v. *State,* 64 Miss. 201, 1 South. 51; *State* v. *Haney,* 151 Mo. App. 251, 132 S. W. 55; *State* v.

Brown, 170 N. C. 714, 86 S. E. 1042; *Gambil* v. *Commonwealth*, 142 Ky. 312, 134 S. W. 160; *Brown* v. *State*, 8 Ga. App. 691, 70 S. E. 40; *Cunningham* v. *State* (Ala. App.), 75 South. 816.)

An information, otherwise sufficient, may charge a violation of the prohibition law by the use of the words "dispose of" without qualifying the meaning further. If the rule of construction announced by sections 8099 and 9154, Revised Codes, is to be heeded, then in such a case as the one at bar it must necessarily be concluded that when a word is used which may have a variety of meanings or be capable of conveying two different ideas, that meaning must be taken from and given to the word which most comports with the sense in which the context of the statute intended it should be used. "A familiar rule of statutory interpretation is that, where general words follow particular and specific words, the former must be held to mean things of the same kind." (*Helena Light & R. Co.* v. *City of Helena*, 47 Mont. 18, 130 Pac. 446.) This rule is likewise applicable to penal statutes. (See *State* v. *Woodman*, 26 Mont. 348, 67 Pac. 1118; also, *In re Hoss' Estate*, 59 Wash. 360, 109 Pac. 1071; *State* v. *Frazier* (N. D.), 167 N. W. 510; *State* v. *Krueger*, 134 Mo. 262, 35 S. W. 604.)

If the meaning of a word is doubtful, or if it cannot be easily ascertained in what sense it was used, or what it was intended that it should signify, or the class of acts or things that it should specify, its meaning may be ascertained by reference to those words with which it was associated. (*Shelly* v. *People*, 54 Colo. 136, 129 Pac. 201; *Ex parte Cannon*, 167 Cal. 142, 138 Pac. 740.)

It seems apparent that in using the words "dispose of" it was intended to convey the idea of a transfer of title or an alienation of intoxicating liquor, regardless of the manner in which it should be accomplished; any other interpretation of the word would not give it any effect, and would render its use ambiguous and meaningless. (*Scott* v. *State*, 6 Ga. App. 332, 64 S. E. 1005.)

It is to be noted that the words "knowingly, willfully and unlawfully" used in the information in this case perform some function in a criminal pleading, and must exclude the idea that the disposition of the liquor was innocent, as contended by appellant. (*People* v. *Mead*, 145 Cal. 500, 78 Pac. 1047, 1048.)

MR. JUSTICE MATTHEWS delivered the opinion of the court.

On the second day of July, 1919, the county attorney of Hill county filed an information against appellant, charging him with the crime of "disposing of certain intoxicating liquors." Appellant did not challenge the sufficiency of the information, but entered his plea of "not guilty," and on the trial was convicted. At the time set for pronouncement of judgment, counsel moved in arrest of judgment on the ground that the information does not state facts sufficient to constitute a public offense, which motion was denied. The only question raised on appeal is as to the sufficiency of the information.

1. The attorney general contends that appellant waived any [1] objection to defects in the information by failure to demur, citing sections 9353 and 9200, Revised Codes. Section 9353 reads as follows: "A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty. * * * It may be founded on any of the defects in the indictment or information mentioned in section 9200, unless the objection has been waived by a failure to demur, and must be made before or at the time the defendant is called for judgment." Among the defects mentioned in section 9200 is that "the facts stated do not constitute a public offense."

In support of his contention the attorney general cites the case of *People* v. *Mead*, 145 Cal. 500, 78 Pac. 1047, and certain Montana cases noted. While the *Mead Case* held that the defect there pointed out was waived by failure to demur, the California statutes on the subject are identical with ours, and the supreme court of that state has held that waiver of defects

by failure to demur covers all defects mentioned in this statute, except want of a statement of facts constituting a public offense (*People* v. *Bryon*, 103 Cal. 675, 37 Pac. 754; *People* v. *Ellenwood*, 119 Cal. 166, 51 Pac. 553), or want of jurisdiction (*People* v. *Matuszewski*, 138 Cal. 533, 71 Pac. 701); that failure to state an offense is such an essential matter that objection may be raised at any time during the progress of the trial. (*People* v. *Smith*, 103 Cal. 563, 37 Pac. 516), and is not waived by failure to demur (*People* v. *Nelson*, 58 Cal. 104–107).

Section 9208, Revised Codes, provides that "when the objections mentioned in section 9200 appear on the face of the indictment or information, they can only be taken by demurrer, except that the objection to the jurisdiction of the court, * * * or that the facts stated do not constitute a public offense, may be taken at the trial, under the plea of not guilty, or after the trial, in arrest of judgment."

This court has never passed directly on the question of waiver of such an objection as is here presented. In *State* v. *Mahoney*, 24 Mont. 281, 61 Pac. 647, it was held that where the objection was that the information charged two separate offenses, "the only method by which the supposed fault now urged can be taken advantage of is by a demurrer interposed under subdivision 3 of section 1922 [9200] of the Penal Code. The failure so to demur is a waiver of the objection." The objection, of course, did not come within the exception made in section 9208.

In the case of *State* v. *Tully*, 31 Mont. 365, 3 Ann. Cas. 824, 78 Pac. 760, the question raised was as to the jurisdiction of the court and would come within the exception; but the court found that "in this the contention of defendant is not sustained. Whether the failure to demur was a waiver, within the meaning of the decision in *State* v. *Mahoney*, * * * is immaterial."

In *State* v. *Van*, 44 Mont. 374, 120 Pac. 479, the court went no further than to hold that "since each count of this information is sufficient, the motion in arrest of judgment was properly

denied." And in *State* v. *Caterni*, 54 Mont. 456, 171 Pac. 284, the court found that the information was not open to the objection urged, and merely in passing stated: "A motion in arrest lies only for certain defects appearing on the face of the * * * information, not waived by failure to demur."

Section 9354, Revised Codes, provides that "The court may also, on its own view of any of these defects, arrest the judgment without motion."

The contention is therefore without merit.

2. Does the information state facts sufficient to constitute a [2] public offense?

The statute under which appellant was prosecuted, in so far as applicable, reads as follows: "Every person who sells, exchanges, gives, barters, or disposes of any * * * intoxicating liquor of any kind, to any person, persons or association or corporation in the state of Montana, * * * shall be guilty of a misdemeanor," *etc.* (Chap. 175, sec. 1, Laws of 1917.) The body of the information recites that the defendant did "knowingly, willfully, and unlawfully dispose of certain intoxicating liquor, to-wit, whisky, * * * " without alleging that such disposition was to any person or entity.

Section 14 of Chapter 143 of the Laws of 1917, commonly known as the Enforcement Act, provides that "In prosecutions * * * relating to intoxicating liquors, * * * it shall not be necessary to state the name of the person to whom sold, exchanged, given away, bartered or disposed of."

Section 9156, Revised Codes, provides that "The * * * information is sufficient if" among other things. "6. * * * The act or omission charged as the offense, is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended."

The disposition of the liquor, contrary to the provisions of the statute, is the gravamen of the offense here charged, and it is immaterial to whom that disposition was made, so long as it was disposed of contrary to law; nor, under the provision of

the Enforcement Act quoted, was it necessary to allege to whom it was disposed of. But it is contended that, unless disposed of to some person or entity, there was no crime committed, and therefore it was necessary to allege that it was so disposed of.

Had the defendant been charged with the *sale* of liquor, it would not have been necessary to allege that the sale was to some person, for "the word 'sale' *vi ex termini*, includes a person to whom the sale is made." (*State* v. *Leonard*, 195 Mo. App. 283, 190 S. W. 957; *State* v. *Ladd*, 15 Mo. 430.) So, also, as to the allegation that defendant did unlawfully "transport and deliver" liquor, for "transport" necessarily carries with it the implication of a transfer of possession to some other person or entity, and the word "deliver" is defined by the lexicographers as "to yield possession of; to hand over." (*Winfrey* v. *State*, 133 Ark. 357, 202 S. W. 23.)

It is urged that the phrase "dispose of" would raise no such presumption, for liquor may be disposed of by its destruction, innocently, as pouring into the gutter, or giving to a sick horse, and such disposition of liquor would not be unlawful; but it must be remembered that the charge here is that the liquor was not only disposed of, but that it was disposed of "willfully, wrongfully, and unlawfully." True, counsel contends that these qualifying words have no significance and cannot aid a faulty pleading, citing the California case of *Going* v. *Dinwiddie*, 86 Cal. 633, 25 Pac. 129, and the Montana case of *Grant* v. *Williams*, 54 Mont. 428, 171 Pac. 276, where this court said: "The most extravagant use of the terms 'wrongfully' and 'unlawfully' will not * * * relieve the pleader of the necessity of stating facts upon which issue may be joined." But it will be noted, however, that both were civil cases, wherein such terms have no fixed and definite meaning; while in criminal cases they and like terms are often indispensable to a charge, and that in California, as well as in this state, such terms have their purpose in and do aid an information, will be seen from the following cases:

In *People* v. *Mead*, above, where a like contention was made, it is said: "A man who was charged with 'willfully, unlawfully, and feloniously conniving at, consenting to, and permitting' the placing of his wife in a house of prostitution, was charged with placing her there for the purpose of prostitution, and not in the innocent capacity of a cook or seamstress. The words 'willfully, unlawfully, and feloniously' must be given some effect in construing such language, and they certainly would exclude an act which by law was innocent." And in *State* v. *Allen*, 34 Mont. 403, 87 Pac. 177, this court indicated that qualifying terms have significance in pleadings in criminal cases, when it said, in holding contrary to the contention that an information did not charge intent: "The term 'feloniously' imports criminal intent, and furnishes exactly the element which counsel say is wanting."

While the term "dispose of" is sufficiently broad to cover an innocent use of or destruction of the liquor, and is defined, as urged, to mean "to get rid of; riddance of, as by removal or destruction," it is also defined as: "To transfer to the control of someone else, as by selling; to alienate; to part with, to relinquish; to bargain away." (New International Dictionary.) "To make over, to part with, as by gift, sale or other means of alienation; alienate or bestow." (Century Dictionary.)

We are of the opinion that, however faulty the information may be, when taken in conjunction with the terms "willfully, wrongfully, and unlawfully," the phrase "dispose of" imports a disposition to some person or entity as fully as does the word "sale."

All that is required in order to advise the accused of the nature of the charge against him, in accordance with his constitutional right, is that "it be set forth in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended"; and we feel that any person "of common understanding," on reading the information before us, would know that he was charged with disposing of intoxicating liquor to some person,

persons, association, or corporation. The law does not require that he be advised as to the identity of such person or entity; had the Enforcement Act not so provided, the case might present a different aspect.

Section 9415, Revised Codes, provides that, after hearing the [3] appeal, the court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties. Here appellant was fully advised of the nature of the charge against him, in such manner as to enable him to prepare to meet that charge and as fully as the Enforcement Act required, and his substantial rights were not affected by any defect in the information, nor is it so contended. To hold the information bad would be to lay down a rule which would permit the guilty to escape punishment on technical grounds and when all his substantial rights have been protected, and this we cannot countenance.

The judgment of the district court of Hill county is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

STATE, RESPONDENT, *v.* MORGAN, APPELLANT.

(No. 4,514.)

(Submitted March 2, 1920. Decided March 29, 1920.)

[188 Pac. 933.]

(For syllabus, see *State* v. *Wehr, ante,* p. 469.)

Cause submitted on briefs of counsel in *State* v. *Wehr, ante,* p. 469.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This cause was based upon an information identical, as to the allegations of the offense charged, with that in *State* v. *Wehr*, *ante*, p. 469, 188 Pac. 930, and the same question was raised on this appeal.

Counsel for appellant and respondent stipulated that this cause should be disposed of at the same time and on the briefs submitted in the *Wehr Case*, and that the same judgment be rendered herein, without argument. The judgment in the case of *State* v. *Wehr* was affirmed. It is therefore ordered that the judgment herein be and the same is hereby affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

STATE, RESPONDENT, *v.* BROOKS, APPELLANT.

(No. 4,419.)

(Submitted March 2, 1920. Decided April 8, 1920.)

[188 Pac. 942.]

Criminal Law—Sedition—Trial—Selection of Jury—Challenges—Refusal—Prejudicial Error—Information—Sufficiency.

Sedition—Reading Information to Jury—Refusal—Error.

1. In a prosecution for sedition for distributing a pamphlet containing statements the nature and probable effect of which was alleged to have been the obstruction of the national draft law, refusal to permit defendant's counsel to read the information and a copy of the pamphlet to the jurors as a basis of their *voir dire* examination was error.

Same—Jury—Purpose of *Voir Dire* Examination—Nature of Right.

2. The *voir dire* examination of jurors is a right secured to defendant by statute, its purpose being to ascertain whether there exist grounds for challenge for cause, and to enable counsel to exercise intelligently the peremptory challenges allowed by law.

Same—Jury—Refusal of Challenge—When Error.

3. If an objectionable juror is forced upon a defendant after he has exhausted his peremptory challenges, a ruling of the court denying a challenge for cause as to such juror will constitute reversible error, if the challenge should have been sustained.

Same—Impartial Jury—Statutes—Constitution.

4. The right to trial by an impartial jury, every member of which is impartial, given by the Constitution (Article III, section 16), is an unqualified one, which it is beyond the power of the legislature to curtail, and any provisions of the statutes which relate to the selection of a jury are to be understood as merely providing the means by which the constitutional guaranty may be exercised to the fullest extent.

Same—Prejudiced Juror—Refusal of Challenge—Error.

5. A juror who testified on his *voir dire* examination that he entertained a bitter prejudice against the Industrial Workers of the World and against every member of it, which would abide with him throughout the trial, that it would require evidence to remove the prejudice, and less evidence to convict defendant, who was a member of the organization, than if he were not a member, was not an impartial juror, and refusal to grant a challenge for cause was error.

Same—Depriving Defendant of Substantial Right—Reversal of Judgment.

6. Whenever it is made to appear in a criminal prosecution that a substantial right has been denied to a defendant, his conviction will not be upheld on appeal.

Same—Conviction—*Quantum* of Proof Necessary.

7. The least *quantum* of proof upon which a judgment of conviction can be made to rest is that produced by evidence sufficient to establish the defendant's guilt beyond a reasonable doubt.

Same—Selection of Jury—Failure to Observe Statute—Effect.

8. The fact that the evidence is sufficient to establish the guilt of one accused of crime cannot be held to have rendered harmless the failure of the court to observe the law in selecting the jury to try him.

Same—Manner of Conducting Trial—Remarks of Judge—New Trial.

9. Remarks of the judge during the progress of a criminal trial and the manner of conducting it may be such as to indicate to the jury that he is prejudiced against defendant and deprive him of a fair trial, necessitating a reversal of the judgment of conviction.

Same—Information—Sufficiency.

10. Information charging that defendant circulated a pamphlet during the progress of the war containing, among others, the statements: "Let those who own the country do the fighting. Put the wealthiest in the front ranks; the middle class next; follow these with judges, lawyers, preachers, and politicians. Let the workers remain at home and enjoy what they produce. Follow a declaration of war with an immediate call for a general strike. Make the slogan, 'Rebellion sooner than war,'" the natural and probable effect of which was to obstruct the draft and the enlistment service of the government, *held*, sufficient to charge sedition.

Appeal from District Court, Beaverhead County; Jos. C. Smith, Judge.

ALBERT BROOKS was convicted of sedition, and from the judgment and from an order denying his motion for new trial, he appeals. Reversed and remanded.

Messrs. Pease & Stephenson and *Messrs. Nolan & Donovan*, for Appellant, submitted a brief; *Mr. Harlow F. Pease* and *Mr. Timothy F. Nolan* argued the cause orally.

Before taking up the specific rulings, we think it proper to discuss two propositions which go to the root of the principal disqualifying cause urged against the Jurors Stinson, Hollingsworth, Andrus, Shawver and Barrett. Both of these propositions the court seemingly ignored. They are: 1. A prejudice against a class is a prejudice against an individual member of that class. 2. Such a prejudice is not "an opinion upon the matter or cause to be submitted to such jury" within the meaning of section 9264, Revised Codes, and the jury cannot be qualified by declaring that they will lay aside such prejudice.

Upon the first mentioned proposition there are a considerable number of decisions clearly sustaining us. (See *Coughlin* v. *People*, 144 Ill. 140, 165, 19 L. R. A. 57, 33 N. E. 1; *United States* v. *Upham*, 2 Mont. 170; *Shane* v. *Butte Elec. Ry. Co.*, 37 Mont. 599, 97 Pac. 958; *Winnesheik Ins. Co.* v. *Schueller*, 60 Ill. 465; *Lawlor* v. *Linforth*, 72 Cal. 206, 13 Pac. 496; *Quill* v. *Southern Pac. Co.*, 140 Cal. 268, 73 Pac. 991; *Territory* v. *Chartz*, 4 Ariz. 4, 32 Pac. 166; *Beach* v. *Seattle*, 85 Wash. 379, 148 Pac. 39.)

Next, we take up the question of the juror declaring that the prejudice in his mind can be laid aside and that he will render an impartial verdict. This is a complete confusion of the statutory rule enacted for the purpose of qualifying persons who have formed opinions based on newspapers, public rumors, *etc.* (Sec. 9264, Revised Codes.) This section has been repeatedly construed. (*People* v. *Riggins*, 159 Cal. 113, 112 Pac. 862; see, also, *State* v. *Beuerman*, 59 Kan. 586, 53 Pac. 874.) We insist that there is no room whatever for the application of section 9264, for the reason that this state of mind which we call, in

common parlance, prejudice, is not an opinion at all. An opinion results from an intellectual process. A prejudice results from an unintellectual emotion, such as fear, desire or malice. (See *Territory* v. *Chartz, supra; Scribner* v. *State,* 3 Okl. Cr., 601, 35 L. R. A. (n. s.) 985, 108 Pac. 422.)

Throughout the selection of the jury, and on ten specific occasions, the court of its own motion intervened in the examination and elicited, or attempted to elicit from jurors, after they had clearly disqualified themselves, some statement in contradiction of what they had previously said in order to find ground for denying the challenge. The effect of this is illustrated by the following passage: "Bontecou, it is true, was brought to make answer that he could render a fair and impartial verdict, in accordance with the law and the evidence, but that result was reached only after a singularly argumentative and persuasive cross-examination by the court." (*Coughlin* v. *People, supra.*) "It is possible for a judge to deprive a party of a fair trial, even without intending to do so, by the manner in which he conducts the case, and by a plain exhibition to the jury of his own opinions in respect to the parties, or to their case." (By Cooley, C. J.) (*Wheeler* v. *Wallace,* 53 Mich. 355, 19 N. W. 33.) "Throughout the trial the greatest latitude was allowed the assistant state attorney, but the defense was held to the strict rules of evidence and procedure. We consider it necessary to call attention to these matters, so that another trial of the defendant may be free from similar improprieties." (*Blackwell* v. *State* (Fla.), 79 South. 731, 1 A. L. R. 516.)

The general rule as to the prejudicial effect of remarks of the court has been recently recognized in *State* v. *Tate,* 55 Mont. 343, 177 Pac. 243. There is a close similarity between the trial court's action in the *Tate Case* and in the case at bar, appealed from the same trial judge. There the court stopped counsel from making a certain argument to the jury—here he stopped counsel from pursuing a certain line of *voir dire* examination. There he followed his ruling by misstating the evidence—here

he followed it by aspersing counsel's motives and uttering an unprovoked threat of contempt proceedings. (See, also, *Kirk* v. *Territory*, 10 Okl. 46, 60 Pac. 797; *State* v. *Phillips*, 59 Wash. 252, 109 Pac. 1047; *State* v. *Moneymaker*, 100 Wash. 463, 171 Pac. 253; *State* v. *Harkin*, 7 Nev. 377, 383; *State* v. *Stowell*, 60 Iowa, 535, 15 N. W. 417.)

Upon the cross-examination of defendant, who took the stand as witness in his own behalf, he was questioned concerning the making of a number of statements alleged to have been made by him at times preceding by many months the occurrence for which he was prosecuted. This was unquestionably by way of laying a foundation for the impeachment of his credit in that he had testified he had no desire or intent to obstruct the draft or enlistment laws, and that he entertained in his mind no disaffection or disloyalty to the cause of the United States in connection with the war. Defendant denied having made the statements imputed to him and they were subsequently testified to in rebuttal by the state's witnesses. This was prejudicial error. (*People* v. *Davenport*, 13 Cal. App. 632, 110 Pac. 318; *State* v. *Broadbent*, 27 Mont. 342, 71 Pac. 1; *State* v. *Cadotte*, 17 Mont. 315, 42 Pac. 857; *Thiele* v. *Newman*, 116 Cal. 571, 48 Pac. 713; *Culpepper* v. *State*, 4 Okl. Cr. 103, 140 Am. St. Rep. 668, 31 L. R. A. (n. s.) 1166, 111 Pac. 679; *State* v. *Jarvis*, 18 Or. 360, 23 Pac. 251; *Albert* v. *McKay & Co.*, 174 Cal. 451, 163 Pac. 666; *National City Bank* v. *Shelton E. Co.*, 96 Wash. 74, 164 Pac. 933; *State* v. *Chynoweth*, 41 Utah, 354, 126 Pac. 302; *Thompson* v. *Los Angeles etc. R. R. Co.*, 165 Cal. 748, 134 Pac. 709.)

Wherever evidence is introduced for a certain limited purpose, which might have a prejudicial effect if considered by the jury for other purposes, the defendant is entitled of right to have a cautionary instruction given to the jury limiting their consideration of such evidence to the true issue upon which it is admitted. (*State* v. *Nielson*, 38 Mont. 451, 100 Pac. 229; *Bruner* v. *United States*, 21 Okl. 410, 96 Pac. 597; *Gray* v. *State*, 4 Okl. Cr. 292, 32 L. R. A. (n. s.) 142, 111 Pac. 825;

People v. *Castile*, 3 Cal. App. 487, 86 Pac. 746; *People* v. *Botkin*, 9 Cal. App. 244, 98 Pac. 861.)

Mr. S. C. Ford, Attorney General, and *Mr. Otto A. Gerth*, Assistant Attorney General, for the State, submitted a brief; *Mr. Gerth* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The defendant was charged with the crime of sedition in obstructing and attempting to obstruct the national selective draft law and the recruiting and enlistment service of the United States at a time when this nation was engaged in the World War, by distributing a pamphlet entitled "War and the Workers by Walker C. Smith." He was convicted and sentenced to imprisonment in the penitentiary and has appealed from the judgment and f om an order denying his motion for a new trial.

The principal errors assigned relate to the preliminaries of [1, 2] the trial. Counsel for defendant obtained leave of court to read the information to the jurors as a basis for the *voir dire* examination, but after reading the formal portion was stopped, upon objection of the county attorney, and denied the right to read the copy of the pamphlet contained in the information. We are unable to understand the theory of the court's ruling. The record discloses that the county attorney had "made a brief statement to the entire panel as to the nature of the case on trial," but the objection interposed to the reading of the information discloses that the contents of the pamphlet had not been made known to the jurors, and that for some reason the county attorney was trying to prevent the contents becoming known to them at that time. The *voir dire* examination of jurors in any criminal case would be an idle ceremony, a useless waste of time, unless the jurors were first made acquainted with the details of the charge preferred against the accused. As a matter of practice it is immaterial whether the

substance of the charge be disclosed by reading the information or by an oral statement of counsel. It is apparent, however, that in this instance the objection was not to the mode of procedure, but to the procedure itself. The *voir dire* examination of jurors is a right secured to the defendant by the statutes and has a definite double purpose: First, to ascertain whether there exist grounds for challenge for cause; and, second, to enable counsel to exercise intelligently the peremptory challenges allowed by law. (*State* v. *Morgan*, 23 Utah, 212, 64 Pac. 356; 24 Cyc. 338; 16 R. C. L. 281.) The trial court erred in refusing to permit counsel for defendant to make known to the jury the details of the charge preferred against the accused.

In the selection of the jury counsel for defendant challenged for actual bias Jurors Stinson, Hollingsworth, Andrus, Barrett and Shawver, but each of the challenges was overruled. Defendant exhausted his peremptory challenges, and in doing so employed four of them to exclude from the jury Stinson, Hollingsworth, Andrus and Barrett. Shawver was one of the jury that tried the cause and returned the verdict of guilty. Many of the assignments relate to the *voir dire* examination of these jurymen, including the ruling in each instance upon the challenge for cause. The attorney general insists that, since Stinson, Hollingsworth, Andrus and Barrett were not of the jurors who tried the cause, the errors, if any, committed in the examination of them are not subject to review. Consideration of this question is not necessary to a determination of these appeals, and we reserve our decision upon it. Authorities favoring, and others in opposition to, the contention will be found cited in the note to *State* v. *Thorne*, Ann. Cas. 1915D, 98.

The rule is recognized everywhere, that if any objectionable [3] juror is forced upon the defendant after he has exhausted his peremptory challenges, the ruling of the court denying a challenge for cause as to such juror will constitute reversible error if the challenge should have been sustained. (Thompson & Merriam on Juries, sec. 276; 16 R. C. L. 291.) The reason for the rule is apparent at first glance. The Constitution

(Art. III, sec. 16) guarantees to everyone accused of crime the right to a trial by an *impartial* jury, and the term "impartial jury" means a jury every member of which is impartial.

The juror Shawver testified that he was acquainted with the organization known as the Industrial Workers of the World; that he entertained a bitter prejudice against the organization and against every member of it; that if it should be developed upon the trial, as it was, that the defendant was then a member of the organization, the prejudice would extend to him and would abide with the juror throughout the trial; that it would require evidence to remove the prejudice and would require less evidence to convict the defendant than it would if he were not a member.

Actual bias is defined by section 9261, subdivision 2, Revised Codes, as "the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party."

The constitutional right to trial by an impartial jury is an [4] unqualified one. The guaranty of that right is found in our Bill of Rights, which declares the fundamental principles necessary to the protection of liberty and the security of government, and which, to all people of the Anglo-Saxon race, are their heritage from the great charter of English liberty. It is beyond the power of the legislature to curtail the right, and therefore the provisions of the statutes which relate to the selection of a jury are to be understood as merely providing the means by which the constitutional guaranty may be exercised to the fullest extent.

Can it be said, then, that a juror who entertains a bitter [5] prejudice against a class of which the defendant is one can act with entire impartiality in passing upon the question of the defendant's guilt or innocence? We think not, even if there were nothing further to shed light upon the state of his mind. (*Shane* v. *Butte Electric Ry. Co.*, 37 Mont. 599, 97 Pac. 958.) In this instance we are not restricted to so meager a

record. The juror testified that his prejudice was of such a character that it would abide with him throughout the trial or until evidence had been introduced sufficient to remove it.

Authorities are not wanting which hold that it is not *per se* a disqualification that the juror entertains prejudice against the defendant which requires evidence to remove, but with that doctrine we have no sympathy. The purpose of a trial of a criminal case is to determine the guilt or innocence of the accused, not to remove the pre-existing prejudice from a juror's mind. It is not to be presumed that the state will introduce the evidence necessary to effect the removal, and it must follow logically that, if the rule adverted to is to be countenanced, the defendant must enter upon the trial with the burden imposed upon him of first convincing the juror that his prejudice is unfounded before the merits of the defense can be considered. Such a burden the defendant cannot be compelled to assume.

The facts of this case do not bring it within the exception noted in section 9264, Revised Codes. No complaint is made that the juror had formed or expressed an opinion as to the guilt or innocence of the accused. He is charged with such prejudice against the defendant as would prevent him from acting with entire impartiality. (*People* v. *Riggins*, 159 Cal. 113, 112 Pac. 862.)

For many years this court has uniformly adhered to and [6] enforced the rule that a conviction will not be set aside for technical errors or defects appearing in the record which do not affect the substantial rights of the accused. That rule does not conflict in the least with the other one that, whenever it is made to appear that a substantial right has been denied to defendant, his conviction will not be upheld.

The least *quantum* of proof upon which a judgment of [7] conviction can be made to rest is that produced by evidence sufficient to establish the defendant's guilt beyond a reasonable doubt. (Sec. 8028, Rev. Codes.) The rule does not admit of any exception; but the juror Shawver testified that, because of defendant's membership in the organization known

as the Industrial Workers of the World, it would require less evidence to convict him than it would if he were not a member of the organization, or, in other words, the state of the juror's mind was such that, because of defendant's membership in the organization, his conviction would be justified by less evidence than the minimum required by law.

The attorney general seeks to avoid the effect of the juror's testimony above by reference to his answers made in response to suggestive questions propounded by the presiding judge. Typical of these questions and answers is the following: "Q. The point is this: The main thing to find out from the jurors is whether or not, placing the man on trial before them, there is any one of them that has his mind made up he is not going to be fair and impartial toward that man. Now, do you believe that you would be in any wise unfair or impartial, rather put it unfair, towards this man? A. No, sir." The observations of this court in *Shane* v. *Butte Electric Ry. Co.*, above, are peculiarly pertinent here. In the light of the testimony theretofore given by the juror and the form of this question propounded to him, the answer above is not entitled to serious consideration. It amounted to nothing more nor less than this: That, admitting his bitter prejudice, the juror had confidence in his ability to act as though he did not entertain any prejudice at all, or, stated differently, the effect of the juror's testimony was that in his opinion he could act with perfect impartiality in convicting the defendant. He might as well have said frankly: "If I am selected as a juror to try this case, I will give the defendant a fair and impartial trial and find him guilty."

It will not do to say that, because the evidence is sufficient [8] to establish the defendant's guilt, therefore the failure to observe the law in selecting the jury to try him ought not to work a reversal of the judgment. The application of such a doctrine would destroy every right guaranteed by the Constitution, lead to anarchy, and defeat the very purpose for which courts are created, *viz.*, to administer justice according to law.

The juror Shawver was clearly disqualified, and the court erred in overruling the challenge for cause. (*Shane* v. *Butte Electric Ry. Co.*, above; *Scribner* v. *State*, 3 Okl. Cr. 601, 35 L. R. A. (n. s.) 985, 108 Pac. 422; *Coughlin* v. *People*, 144 Ill. 140, 19 L. R. A. 57, 33 N. E. 1.)

Numerous errors are predicated upon remarks made by the [9] court during the progress of the trial, and the manner in which the trial was conducted is made the subject of vigorous criticism. Without intending to reflect in the least upon the integrity or honesty of purpose of the presiding judge, we think this record suggests that, if he was not prejudiced against the defendant, his remarks and manner of conducting the trial might well have led the jury to believe that he was. We quote approvingly the following language by Chief Justice Cooley in *Wheeler* v. *Wallace*, 53 Mich. 355, 19 N. W. 33: "It is possible for a judge to deprive a party of a fair trial, even without intending to do so, by the manner in which he conducts the case, and by a plain exhibition to the jury of his own opinions in respect to the parties, or to their case; and, when it is apparent that a fair trial has not been had, a court of review should give relief as soon for that cause as for any other." To the same general effect are *State* v. *Stowell*, 60 Iowa, 535, 15 N. W. 417; *State* v. *Harkin*, 7 Nev. 377, and 16 C. J. 827.

The other assignments require but brief consideration. Defendant's instruction No. 2 placed too great a restriction upon the evidence to which it was directed. (*State* v. *Wyman*, 56 Mont. 600, 186 Pac. 1.) His offered instruction No. 3 presents the same question that was decided adversely to his contention in *State* v. *Smith*, *ante*, p. 349, 188 Pac. 644; and his offered instruction No. 4 presents the same contention that was decided adversely to him in *State* v. *Wyman*, above.

Instruction No. 1, offered by the defendant, is in effect a [10] peremptory direction to the jury to return a verdict of not guilty. It proceeds upon the assumption that the information does not state a public offense. It must be conceded that from the very language employed in it the pamphlet in ques-

tion must have been published some time before we entered the war. It is directed against war generally and against what is denominated the agitation for war with Mexico and Japan. It contains many statements that to a person not in sympathy with the views of the author would doubtless be considered witless; but it does contain some statements the natural and probable effect of which would be to obstruct the draft and the recruiting and enlistment service of the government; for instance, the following: "Let those who own the country do the fighting. Put the wealthiest in the front ranks; the middle class next; follow these with judges, lawyers, preachers, and politicians. Let the workers remain at home and enjoy what they produce. Follow a declaration of war with an immediate call for a general strike. Make the slogan, 'Rebellion sooner than war.'"

We think the information states a public offense, and that the court did not err in refusing to direct an acquittal.

Our conclusion is that the defendant was not accorded that fair and impartial trial guaranteed to him by the Constitution and laws of this state, and for this reason the judgment and order are reversed, and the cause is remanded to the district court of Beaverhead county for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

PARHAM, RESPONDENT, v. CHICAGO, MILWAUKEE & ST. PAUL RY. CO., APPELLANT.

(No. 4,102.)

(Submitted February 26, 1920. Decided April 8, 1920.)

[189 Pac. 227.]

Carriers — Livestock —Contracts—Custom—Evidence—Claim of Loss—Measure of Damages—Harmless Error.

Carriers—Livestock—Contract of Carriage—Ambiguity—Parol Evidence

1. Where a contract of carriage of livestock provided that transportation should be had to a named station in another state, and from thence *via* a given carrier and connections "to ——" station, consigned to D., an ambiguity as to destination existed which could be explained by parol testimony.

Same—Liability for Negligence of Connecting Carrier.

2. In an action for damages flowing from the failure of the carrier of livestock to stop over at a certain station for the purpose of feeding, according to established custom, the carrier could not escape liability by proof that the cause of action arose after the shipment was taken over by a connecting carrier, where the shipper was charged through rates from the point of shipment in Montana to destination in another state, its liability in this respect being unaffected by the fact that the person in charge of the stock signed a new contract with the connecting carrier.

Same—Livestock—Failure to Stop and Feed—Custom—Evidence.

3. Where a contract for the shipment of livestock was made with reference to a custom not mentioned therein, to stop over at a certain point for feeding, proof of the custom was admissible for the purpose of ascertaining the intent or understanding of the parties, and was not objectionable as tending to vary by parol the terms of the writing.

Custom—Evidence.

4. While usage or custom cannot make a contract where none has been made, general usage affecting any branch of business furnishes good evidence of what is regarded as right and reasonable in the premises.

Pleading and Practice—Admissions—What may Constitute.

5. An allegation in an answer that a fact stated in the complaint is true, or the affirmative statement therein of a fact which is likewise pleaded in the complaint, is an admission of the truth of the allegation of the complaint, and proof thereof is not necessary.

Carriers—Livestock—Authority of Attendant—Jury Question.

6. *Held*, that the question whether the person in charge of a livestock shipment, or "shipper," so styled by plaintiff, had ostensible authority to direct the conductor in charge of the train not to stop for feeding at a certain station, contrary to an established custom, or was acting as a mere special agent with no other authority than to act as attendant, was one for determination by the jury.

Same—Notice of Claim of Loss—Secondary Evidence—Harmless Error.

7. Where there was a valid proof of service of notice of claim for loss on the connecting carrier within the time fixed by the contract

of carriage, error in admitting secondary evidence thereof, without demand on defendant to produce the original, was not prejudicial.

Same—Purpose of Notice of Claim of Loss—Measure of Damages.

8. The notice of claim of loss sustained in transportation by a shipper of livestock is to enable the carrier to make investigation as to the situation and conditions existing at the time and in order that there may be no unreasonable delay in bringing action, and does not bar recovery of a larger amount than that stated in it, except, perhaps, where the sum claimed has been tendered in settlement.

Appeal from District Court, Yellowstone County; George W. Pierson, Judge.

ACTION by Owen B. Parham against the Chicago, Milwaukee & St. Paul Railway Company. From a judgment for plaintiff, and an order denying a motion for new trial, defendant appeals. Reversed and remanded.

Mr. H. H. Field, of the Bar of Illinois, and *Mr. Geo. W. Farr,* for Appellant, submitted a brief; *Mr. Farr* argued the cause orally.

What is the liability of the appellant railway company for not stopping the shipment in question at Stockdale for feeding purposes? Recovery is sought under the Act of Congress generally known as the Carmack Amendment of June 29, 1908, as subsequently amended. This amendment only imposes liability for some default in a carrier's common-law duty, and not liability in an insurer. (*Adams Express Co.* v. *Croninger,* 226 U. S. 491, 44 L. R. A. (n. s.) 257, 57 L. Ed. 314, 33 Sup. Ct. Rep. 148; *Chicago etc. Ry. Co.* v. *Latta,* 226 U. S. 519, 57 L. Ed. 328, 33 Sup. Ct. Rep. 155 [see, also, Rose's U. S. Notes].)

It was never intended that the Carmack Amendment should make the initial carrier absolutely liable, independent of negligence, but it merely permits the shipper to recover without the burden of locating the particular company negligent, and to annul stipulations usual in bills of lading limiting liability of connecting carriers to damages on their own lines. (*Pecos & N. T. Ry. Co.* v. *Meyer* (Tex. Civ. App. 93), 155 S. W. 309.)

In an action under the Carmack Amendment, the plaintiff must produce the bill of lading, if one was issued, or he cannot

recover. (*Burtless* v. *Oregon S. L. Ry. Co.*, 180 Ill. App. 249.) The bill of lading issued to Farmington only, at which point another bill of lading was issued by the Rock Island & Pacific Railway Company for the carriage of the sheep to Chicago, Illinois. This was a new contract entirely separate and independent of that entered into with the appellant railway company, and one to which that company was not a party. We submit that the obligation of the Chicago, Milwaukee & St. Paul Railway Company ceased when the sheep reached Farmington. (*Barrett* v. *Northern Pac. Ry. Co.*, 29 Idaho, 139, 157 Pac. 1016; *Parker-Bell Lumber Co.* v. *Great Northern Ry. Co.*, 69 Wash. 123, 41 L. R. A. (n. s.) 1064, 124 Pac. 389.) The liability of the initial carrier cannot be extended beyond the contract, evidenced by the bill of lading, to deliver the shipment at the place of destination therein named. (*Parker-Bell Lumber Co.* v. *Great Northern Ry. Co., supra; Ross* v. *Maine Cent. R. Co.*, 112 Me. 63, 90 Atl. 711.)

Should the court hold that there was an obligation resting upon the Chicago, Rock Island & Pacific Ry. Co. to stop at Stockdale, for the failure of which the appellant would be responsible, we then submit that the plaintiff could not recover if the person in charge of the shipment (possessing the authority not only presumed to be possessed by such person, but also the authority which appellant offered to prove he actually did possess), directed that the sheep be not stopped. (*Wabash R. Co.* v. *United States*, 178 Fed. 5, 21 Ann. Cas. 819, 101 C. C. A. 133; *Atchison, T. & S. Ry. Co.* v. *United States*, 178 Fed. 12, 101 C. C. A. 140; *Jennings* v. *Grand Trunk Ry. Co.*, 127 N. Y. 438, 28 N. E. 394; *Armstrong* v. *Chicago etc. Ry. Co.*, 53 Minn. 183, 54 N. W. 1059; Hutchinson on Carriers, 2d ed., secs. 84a, 159, 265, 266, 457; Elliott on Railroads, 2d ed., secs. 212, 1408.)

When the shipper accompanies the property, the burden is upon him of showing that the damage did not result from any fault of his own in loading or caring for the stock, and, as a general rule, he must also show such a state of facts as makes

out a *prima facie* case of negligence on the part of the defendant. (*Colsch* v. *Chicago etc. Ry. Co.*, 149 Iowa, 176, Ann. Cas. 1912C, 915, 34 L. R. A. (n. s.) 1013, 127 N. W. 198; 4 Elliott on Railroads, 2d ed., 1549.)

Mr. F. B. Reynolds, for Respondent, submitted a brief, and argued the cause orally.

The plaintiff, having directed the shipment to stop at Stockdale, it was the duty of defendant company and its connecting carrier to comply with such directions, even though not included within the express written contract. (Rev. Code, sec. 5307; 10 C. J. 81–83; *St. Louis & S. F. Ry. Co.* v. *Wm. Bondies & Co.* (Okl.), 166 Pac. 179; *Ryan* v. *Great Northern Ry. Co.*, 90 Minn. 12, 95 N. W. 758; *Wente* v. *Chicago etc. R. Co.*, 79 Neb. 179, 15 L. R. A. (n. s.) 756, 115 N. W. 859; *Fort Worth etc. Ry. Co.* v. *Caruthers* (Tex. Civ.), 157 S. W. 238; *Sharp* v. *Clark*, 13 Utah, 510, 45 Pac. 566; *Atchison etc. Ry. Co.* v. *Schriver*, 72 Kan. 550, 4 L. R. A. (n. s.) 1056, 84 Pac. 119; *Colbath* v. *Bangor etc. R. Co.*, 105 Me. 379, 134 Am. St. Rep. 569, 74 Atl. 918; *Western etc. R. Co.* v. *Exposition Cotton Mills*, 81 Ga. 522, 2 L. R. A. 102, 7 S. E. 916; *Wright etc. Wire Cloth Co.* v. *Warren*, 177 Mass. 283, 58 N. E. 1082; *Pavitt* v. *Lehigh Valley R. R.*, 153 Pa. St. 302, 25 Atl. 1107; *Texas & N. O. R. Co.* v. *Davis-Fowler Co.*, 63 Tex. Civ. 242, 133 S. W. 309; *Michigan etc. R. Co.* v. *Day*, 20 Ill. 375, 71 Am. Dec. 278.)

The Carmack Amendment provides that the carrier "receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injuries to such property caused by it." Thus, it will be seen that the criterion of liability is not whether there was one or more contracts in the course of the transportation or whether by one company or by two, but is whether or not the initial carrier received the property for transportation from a point in one state to a point in another state.

The evidence in the case at bar is undisputed that the shipment was delivered to the defendant company for transportation to Chicago, and not to Farmington. The contract to Farmington was made simply for the matter of convenience between the carriers, and was a matter over which the shipper had no control whatever and in which he had no interest. The shipment was made upon the through rate from Harlowton to Chicago, which in itself imports an undertaking on the part of the defendant company to transport the shipment to its ultimate destination at Chicago. (*Savannah, F. & W. R. Co.* v. *Commercial Guano Co.*, 103 Ga. 590, 30 S. E. 555; *Pittsburg etc. R. Co.* v. *Bryant*, 36 Ind. App. 340, 75 N. E. 829; *Eckles* v. *Missouri P. R. Co.*, 112 Mo. App. 240, 87 S. W. 99; *Mann* v. *Birchard*, 40 Vt. 326, 94 Am. Dec. 398.)

Liability of initial carrier for damages due to the negligence of connecting carrier is not affected by the fact that the initial carrier issued a contract for transportation to the end of its line only, and there delivered the goods to connecting carrier, which made a new contract for carrying the shipment over its own line. (*Louisville & N. R. Co.* v. *Scott*, 219 U. S. 209, 55 L. Ed. 183, 31 Sup. Ct. Rep. 171 [see, also, Rose's U. S. Notes]; *Houston & T. C. R. Co.* v. *Lewis*, 103 Tex. 452, 129 S. W. 594; *Texas Cent. Ry. Co.* v. *Hico Oil Mill*, 62 Tex. Civ. 620, 132 S. W. 381; *Chesapeake & Ohio R. Co.* v. *National Bank of Commerce*, 122 Va. 471, 95 S. E. 454; *Atlantic Coast Line R. Co.* v. *Riverside Mills*, 219 U. S. 186, 31 L. R. A. (n. s.) 7, 55 L. Ed. 167, 31 Sup. Ct. Rep. 164 [see, also, Rose's U. S. Notes]; *Atchison etc. Ry. Co.* v. *Word* (Tex. Civ.), 159 S. W. 375.)

The custodian of a sheep shipment is a special agent, and has no authority except such as is expressly conferred upon him, and carrier is bound, at its peril, to ascertain the extent of his authority. (31 Cyc. 1403; *Southern Ry. Co.* v. *Webb*, 143 Ala. 304, 111 Am. St. Rep. 45, 5 Ann. Cas. 97, 39 South. 262; *Atchison etc. Ry. Co.* v. *Watson*, 71 Kan. 696, 81 Pac. 499; *Lake Shore etc. Ry. Co.* v. *National Live Stock Bank*, 178 Ill. 506,

53 N. E. 326; *Fort Worth & D. C. Ry. Co.* v. *Caruthers* (Tex. Civ.), 157 S. W. 238.)

MR. JUSTICE HURLY delivered the opinion of the court.

Plaintiff alleges the delivery to defendant railway company on November 18, 1915, of five cars of lambs at Harlowton, Montana, for transportation to Chicago, Illinois, "with stopover at Stockdale, Illinois, for feeding purposes," and that defendant for a valuable consideration contracted to make such transportation and to deliver the lambs at their destination over its own line and the line of the Chicago, Rock Island & Pacific Railway Company, and "issued a through waybill therefor, with provisions for such stopover," all of which was directed by plaintiff at the time of such shipment; that in violation of plaintiff's orders, and contrary to the provisions of said waybill, the Chicago, Rock Island & Pacific Railway Company willfully and negligently failed to stop said sheep at Stockdale, but carried them through that station to Chicago and forced them on the market in a badly shrunken condition, without any opportunity for plaintiff to finish them for the market or for the sheep to regain the shrinkage by feeding at Stockdale as contemplated by him at the time of shipment.

The complaint further alleges that it is customary in shipping sheep to the Chicago market from Montana points to stop over at some station near Chicago for feeding, in order to allow such sheep to regain flesh lost by shrinkage and to be finished for the Chicago market; that sheep are commonly fed at Stockdale for that purpose, and that it was the object of plaintiff in stopping said sheep at said station that they be fed for the purposes above mentioned, all of which was and is known by said railway companies. It is further alleged that the lambs were unloaded in the stockyards at Chicago before plaintiff had any knowledge that they had not been stopped at said station of Stockdale, and that because such stockyards were in quarantine, it was impossible to withdraw the lambs therefrom for

feeding purposes, and therefore that said lambs could be disposed of in no other manner than by sale upon the market for slaughtering purposes. The complaint contains allegations as to the shrinkage asserted to have been lost and as to the gain in weight which would have been made by the lambs, had they been fed at Stockdale, and contains appropriate allegations as to the damages claimed to have been sustained by the plaintiff.

The answer alleges that the only contract entered into between the plaintiff and the defendant for the shipment of the sheep was one in writing denominated as exhibit "A." Further answering, the defendant admits that the sheep were not stopped at said feeding station, and that they were carried on directly to the stockyards at Chicago, and alleges that the failure to stop the sheep at said station was at the special instance and request of the plaintiff, his agents, servants, and employees in charge of the sheep at said time and place, who specifically requested and demanded of the Chicago, Rock Island & Pacific Railway Company, before the sheep arrived at Stockdale, that the sheep should not be stopped at that point, but should pass on directly to the stockyards at Chicago. There are other allegations averring due care in handling the sheep and full compliance with the contract, which, however, in view of the issues presented, it is not necessary to discuss.

The defendant denies the allegations as to the custom in stopping sheep consigned to the Chicago market, at Stockdale, but admits that sheep that are shipped to Chicago for that market are often fed there. The answer further alleges that, had it not been for the request and demand of the plaintiff, his agents, servants and employees, upon the Chicago, Rock Island & Pacific Railway Company, the said sheep would have been stopped and unloaded for feeding, and that by reason of such request the plaintiff is now estopped from asserting or making claim for damages by reason of any loss, damage or injury because of the failure to stop the shipment there. The defendant otherwise denies the material allegations of the complaint and further alleges that plaintiff did not present his claim for any

alleged loss in writing or otherwise, within four months after said alleged injury or damage, as required by the contract exhibit "A." The contract, exhibit "A," recites the delivery of the sheep to the defendant railway company and contains this provision: "Which said livestock has been received by said company for transportation over its lines from Harlowton station to Farmington, Minn., station, thence to be forwarded via c/o C., R. S. & P. Ry. Co. and connections to ——, consigned to Walter Dunbar, upon the following terms and conditions."

The contract further contained a provision that no claim for loss, injury, or damage to the livestock, nor for delay or decline in the market, should be valid unless presented to the company in writing within four months. This contract was signed by W. T. Hart, agent of the railway company, and by one J. McD. Hervey, "Person in Charge of Stock"; also "O. B. Parham, Shipper, by R. E. Gruwell." The only recital in the contract as to the destination of the sheep is the one hereinbefore quoted, and nothing is said concerning stopover privileges at Stockdale. It appears, however, that waybills which were introduced in evidence, issued at Harlowton, contain recitals that the sheep were to be shipped from Harlowton to Farmington, Minnesota, consigned to Walter Dunbar, Chicago, Illinois, care of "C., R. I. & P. Railway Company," and each thereof contained this clause: "Stop to feed at Stockdale, Ill."

R. E. Gruwell, a witness for the plaintiff, testified that he was the agent who attended to the billing of the shipment, and that the sheep were "delivered to the railway company at Harlowton to be shipped to Chicago; that is, they were billed to Chicago and fed in transit at Stockdale. Such were the directions given by me to the billing clerk at the time. I got my directions as to the shipment from Mr. Parham."

Testimony was received as to a custom of stopping at Stockdale for the purposes alleged in the complaint, and also testimony as to the shrinkage and gain in weight as alleged in the pleadings, and as to plaintiff's damages. The plaintiff, in addition, introduced in evidence the contract, exhibit "A," attached

to the complaint, and the waybills issued by each carrier. It also appears from the testimony that neither Mr. Parham nor Mr. Gruwell accompanied the shipment, but that Hervey and one Schmeling did so. Mr. Parham testified: "These two persons accompanied the sheep as shippers." When the sheep arrived at Farmington, a new shipping contract was entered into on behalf of the Chicago, Rock Island & Pacific Railway Company, signed by O. B. Parham, by Hervey, "Shipper's Agent." In connection therewith Mr. Parham testified: "Mr. Hervey signed the contract, Plaintiff's Exhibit 'A,' in my behalf."

After the plaintiff rested, the defendant sought to show by the testimony of George Schmeling, above referred to, directions purporting to have been given by Hervey to the conductor to the effect that the shipment should not be stopped at Stockdale. This testimony the court excluded and the defendant then made the following offer of proof:

"Mr. Farr: The defendant now offers to show by the witness on the stand, and that the said witness would testify, that J. McD. Hervey was the person in charge of the shipment of sheep in question from Harlowton, Montana, to Chicago, Illinois; that he was placed in charge of said sheep by the owner, O. B. Parham, through R. E. Gruwell, agent of the owner; that R. E. Gruwell, at the time of the placing of the said J. McD. Hervey in charge of the sheep, had express authority from O. B. Parham to place the said Hervey in charge of the sheep; that before the sheep arrived at Stockdale the said J. McD. Hervey was the person in charge of the sheep, and requested and demanded the conductor in charge of the train of the Chicago, Rock Island & Pacific Railway Company not to stop said sheep at Stockdale, but to go on through without stop, to Chicago," *etc.*

The defendant also offered to prove by the conductor in charge of the train that Hervey had given directions not to stop the sheep at Stockdale, but to take them on to Chicago. The offer of proof was similar to that made when the witness Schmeling was on the witness-stand. The offered evidence was

excluded. Plaintiff recovered judgment, and from the judgment, and an order denying its motion for a new trial, defendant has appealed.

The written contract made at Harlowton does not recite that [1] the sheep were consigned to Chicago, but states: "Which said livestock has been received by said company for transportation from Harlowton station to Farmington, Minn., station, thence to be forwarded *via* c/o C., R. S. & P. Ry. Co. and connections to ——, consigned to Walter Dunbar," *etc.* This created an ambiguity, which we think the plaintiff was entitled to explain by parol testimony, to show that the sheep were consigned to Dunbar at Chicago, if such was the fact, and it is apparent from a reading of the clause that it was the intention of the shipper and the railway company that the sheep should go forward to their ultimate destination from Farmington, *via* the C., R. S. & P. Ry. Co. That this was the intention both of plaintiff and of the defendant is made apparent by the provisions of the waybills, which, while not a part of the contract, afford evidence of what was the agreement. These, as before indicated, contain recitals that the sheep are to be shipped from Farmington, via. the C., R. etc. Ry. Co., to Chicago. We think the court was justified in treating the shipment as one from Harlowton to Chicago, to be handled by defendant and its connecting carrier.

The shipment being a through shipment from Harlowton [2] over the line of defendant and its connections, the defendant may not avoid liability by proof that the cause of action arose after the shipment was taken by the defendant's connecting carrier. The fact that the shipper's agent or person in charge of the shipment signed a new contract at Farmington with defendant's connecting carrier does not change the situation, and this particularly in view of the charging of the through rate from Harlowton to Chicago. (*Missouri etc. R. Co.* v. *Word,* 244 U. S. 383, 61 L. Ed. 1213, 37 Sup. Ct. Rep. 617; *Savannah etc. R. Co.* v. *Commercial Guano Co.,* 103 Ga. 590, 30 S. E. 555; *Pittsburg etc. R. Co.* v. *Bryant,* 36 Ind. App.

340, 75 N. E. 829; *Eckles* v. *Missouri P. R. Co.*, 112 Mo. App. 240, 87 S. W. 99; *Louisville & N. R. Co.* v. *Scott*, 219 U. S. 209, 55 L. Ed. 183, 31 Sup. Ct. Rep. 171 [see, also, Rose's U. S. Notes]; *Houston & T. C. R. Co.* v. *Lewis*, 103 Tex. 452, 129 S. W. 594; *Chesapeake & O. Ry.* v. *National Bank of Commerce*, 122 Va. 471, 95 S. E. 454.)

It is asserted by the appellant that, the contract being silent [3] as to stopping the shipment at Stockdale, to regain the shrinkage, *etc.*, plaintiff's evidence that such was the custom is an attempt to vary by parol the terms of the written contract. Our statute provides:

Section 7887, Revised Codes, subdivision 12: "Evidence may be given upon a trial of the following facts: * * * Usage, to explain the true character of an act, contract or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation."

Section 7877: "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

If, as the testimony discloses, it is the custom to stop Montana shipments of stock to Chicago at Stockdale for feeding, the plaintiff is not attempting to vary the terms of the contract, but to explain and interpret the intention of the parties.

"Evidence of usage or custom is not considered in the nature of parol evidence to contradict or vary the legal import of a written agreement, but is received for the purpose of ascertaining the intent and understanding of parties, by their contracts, which are made with reference to such usage or custom. The use of such evidence is confined, however, to cases where the intent is not clearly expressed in the contract, for it is to be remembered that usage cannot make a contract where there is [4] none. Where there is an absence of clear stipulations in contracts, the usage may be proved to show the actual intent and purpose of the parties. General usage affecting any

branch of business furnishes good evidence of what is regarded as right and reasonable in that respect.

"Where a custom does not contradict or is not inconsistent with the terms of a contract, it may be invoked to introduce a new element not expressly employed in the contract and in reference to which the parties are presumed to have contracted. The reason is that, where there is nothing in a contract to exclude the inference, the parties will be presumed to have contracted in reference to customs and usages prevailing in the particular business and applicable to the contract in question. In other words, a custom or usage, consistent with the terms of the contract, peculiar to the subject matter thereof, known to the parties, and probably intended to be included in the contract, as shown by their situation and purposes, the nature of the subject matter and the attendant circumstances may be shown as an aid to the interpretation of a contract." (Paragraphs 1706 and 1721, Elliott on Contracts.)

In our view, the waybills are not, strictly speaking, a part of the contract, but giving effect to section 7877, *supra*, the plaintiff averring a custom of stopping shipments at Stockdale for feeding purposes, was entitled to show that such custom existed, for the purpose of showing the real character of the transactions had. Further light is thrown upon the situation by the answer of the defendant, in which it is alleged that "had it not been for the request and demand made by the plaintiff's shippers, agents, servants, and employees as aforesaid, upon the Chicago, Rock Island & Pacific Railway Company, not to stop said sheep at said station of Stockdale, Illinois, the said sheep would have been stopped there and unloaded for feeding."

While the answer elsewhere denies that it was the intention [5] of the parties that the stock were to be fed at Stockdale, as said in the case of *O'Donnell* v. *Butte*, 44 Mont. 97, 119 Pac. 281: "An allegation in an answer that a fact stated in the complaint * * * is true, or the affirmative statement in the answer of a fact which is likewise pleaded in the complaint, is an admis-

sion of the truth of the allegation of the complaint, and proof is not necessary."

As to the authority of the person in charge of the stock to [6] give directions for its handling, we have not been cited to a case directly in point, and have been unable to find any such in our own investigations. The contract does not fix his duties, nor furnish any statement as to the authority conferred upon him. The contract designates him as "person in charge of stock." Mr. Parham, the plaintiff, testified that Hervey and Schmeling went with the sheep as "shippers." Hervey, the "person in charge of stock," signed the new contract, made at Farmington, in the name of Mr. Parham. In connection therewith Mr. Parham testified: "He signed in my behalf."

One Weitz, station agent of the Rock Island at Stockdale, and in charge of the stockyards there, whose deposition was taken in behalf of plaintiff, by whom it was offered in evidence, testified: "I received notice that these five carloads of lambs were to stop at Stockdale on that date from my foreman at Stockdale. I was afterward told that they were not to feed, and that the man in charge had ordered them to go through. I am not sure from whom I received that information, but think it was from the telegraph operator at Stockdale."

The plaintiff offered in evidence a letter of W. O. Bunger, general superintendent of freight claims for the Rock Island Railway, which contained this statement: "Furthermore, it appears that the man in charge of shipment requested that the same be forwarded through to destination without unloading at Stockdale, and such being the case you will readily understand this company was in no way responsible for the shipment having passed through Stockdale without having been unloaded." Mr. Weitz, testifying for the plaintiff, further stated with reference to custom and handling of sheep at Stockdale: "The owner determines whether or not they stop. * * * The owner usually determines how long the sheep shall remain at the feeding station. * * * In the absence of the owner,

I take orders from whoever was in charge of them." All of the foregoing was a part of plaintiff's case in chief.

On its case, defendant's witness Dietrick, conductor for the Rock Island, in charge of the train handling this shipment through Stockdale, testified: "I have handled livestock trains of western livestock from Montana points to the Chicago market off and on for seven years. In most cases in the shipment of stock there is some person in charge of the shipment, and as conductor of the train I receive my instructions and directions as to the handling of the sheep, when the owner is not along, from the man in charge."

The trial court, as above noted, excluded evidence as to any directions given by Hervey to the conductor concerning stopping the sheep at Stockdale, upon the ground that he was a mere special agent of the plaintiff, and had no authority to give orders concerning its diversion or handling.

Respondent cites us to the following authorities in support of his contention that the custodian of a shipment is a mere special agent, and has no authority except such as is expressly conferred upon him, and that the carrier is bound, at its peril, to ascertain the extent of his authority: 31 Cyc. 1403; *Southern Ry. Co.* v. *Webb*, 143 Ala. 304, 111 Am. St. Rep. 45, 5 Ann. Cas. 97, 39 South. 262; *Atchison etc. Ry.* v. *Watson*, 71 Kan. 696, 81 Pac. 499; *Lake Shore etc. Ry. Co.* v. *National Live Stock Bank*, 178 Ill. 506, 53 N. E. 326; *Ft. Worth & D. Ry. Co.* v. *Caruthers* (Tex. Civ. App.), 157 S. W. 238.

In *Southern Ry. Co.* v. *Webb, supra*, plaintiff, the owner of hogs, consigned the same to Atlanta, Georgia. Robinson, his employee, who delivered the hogs to the railway company for shipment, at the time of delivery entered into a contract differing from that made by plaintiff with the railway company, changing their destination and the name of the consignee. It was shown that Robinson's duties were simply to deliver the hogs to the railway company and that he was without any other authority. The court held he was a mere special agent, and

that the company was charged with knowledge of the extent of his authority.

In *Atchison etc. Ry. Co.* v. *Watson, supra,* Watson, the owner of cattle, shipped the same to St. Louis from a point in Kansas, and for damages by reason of a delay in handling the shipment he brought action. It was shown that a son of the plaintiff accompanied the cattle, and, at the time they were loaded upon the cars, signed his father's name to a printed contract purporting to be that under which the shipment was made, and to supersede any prior agreement. The terms of this written contract precluded a recovery, if the son executed it under such circumstances as to bind the plaintiff. The defendant contended that under the admitted facts the son was the father's agent for that purpose, or at all events the company was justified in so treating him, and that the court should have so instructed. On appeal the supreme court held the question of authority of the son was for the jury's determination.

In *Lake Shore Ry. Co.* v. *National Livestock Co., supra,* it is merely held that, where a purchasing agent consigns cattle bought by him to his principal, he cannot afterward, while they are in transit, change their destination, nor confer a right to make such change on another.

In the case of *Fort Worth & Denver Ry. Co.* v. *Caruthers, supra,* Caruthers had shipped cattle from a point in New Mexico consigned to Fort Worth, Texas. The first carrier conveyed the cattle to Amarillo, and from there they were taken by another carrier to Fort Worth. The owner contended that at the time of shipping the cattle it was agreed that they should be stopped at Amarillo, to await his further instructions before taking them on to Fort Worth, so that he might avail himself of other markets if the Fort Worth market was not satisfactory. It appeared from the evidence that at Amarillo the connecting carrier insisted on taking the cattle forward over the protest of the person in charge of the stockyards; also, that the cattle were in charge of one Davis as caretaker, and that Davis finally signed a new bill of lading for the transportation

of the cattle from Amarillo to Fort Worth. In discussing the case, the court said: "The facts are practically undisputed that the cattle were to be stopped at Amarillo, and that they were not to be moved therefrom until Caruthers arrived or until the shipper heard from him. Appellant knew of this order from the owner, and, when it and the shipper shipped the cattle, it knew that it was doing so without authority from the owner and over his direction. It was charged with full knowledge of the scope of the agent's authority. It was at least a proper question for the jury, and if they found that the shipper consented to the shipment of the cattle over his instructions from the owner, and that appellant knew he was not authorized to do so, or if he knew his instructions forbade his doing so, then it became a party to the wrong, and cannot justify itself on the ground that it procured the consent of the agent in charge of the cattle. If the evidence made it clear that the shipper had authority to deliver the cattle for appellant, or that appellant did not know that they were to be held at Amarillo, then it might be contended that the appellant was warranted in presuming the shipper had authority to reship the cattle." (*Gulf etc. Ry. Co.* v. *White* (Tex. Civ. App.), 32 S. W. 322.)

In *Gulf etc. Ry. Co.* v. *White* (Tex. Civ. App.), 32 S. W. 322, White, the owner of the cattle, shipped the same over the line of the defendant railway company. In his complaint he did not sue on a written contract, but the defendant by answer alleged that the cattle were shipped under written contracts executed by the plaintiff, acting through certain alleged agents. The plaintiff by reply denied the authority of anyone to execute the contracts referred to. The written contracts pleaded by the defendant were shown to have been executed in plaintiff's name by certain of his employees sent by him with the shipment of cattle. Plaintiff testified that he sent said employees to take care of the cattle, and that he paid the through rate of freight in advance to the first carrier, and that he gave his employees no authority to sign any contracts. When the cattle reached Fort Worth they were delivered to the defendant rail-

way company under contracts then signed by the employees. The court said: "If it had been made clearly to appear that the employees who accompanied the cattle had authority to deliver them to appellant for shipment, then authority to execute the written contracts of shipment might be presumed. (*Ryan* v. *Railway Co.*, 65 Tex. 13 [57 Am. Rep. 589].) But in this respect the case does not appear to be well developed. In fact, it is not definitely shown by whom the cattle were delivered to appellant. We therefore think the court erred in assuming that the contracts were executed by appellee's authority, and hold that that question should have been submitted to the jury. In so ruling, we do not mean to say that the evidence bearing on the question will not support a finding that the authority existed. We are aware of the rule that holds that, although no express authority be given to do a particular act, yet, if such act be within the apparent scope of the agent's authority, his act will bind his principal. But whether or not the act be within the apparent scope of the authority given is, it seems to us, a question of fact for the jury to decide." (See, also, *Waldron* v. *Fargo*, 170 N. Y. 130, 62 N. E. 1077.)

It will be observed, from the foregoing, that in each of the cases cited the question of the agent's authority and whether he acted within its apparent scope was held to be a question for the jury. Here we also have the testimony of Mr. Parham that Hervey accompanied the stock as "shipper." The trial court adopted the view that Hervey was at most a special agent. We think, however, that it cannot be said as a matter of law that one who accompanies a stock shipment, either as "person in charge of stock" or "shipper," is necessarily a special agent. Under the federal statutes such person is given express authority to sign a release to the railway company from liability for failure to unload the shipment for rest, *etc.* By reason of his conduct in contributing to the injury of the stock in his charge, it has likewise been held that the shipper may not recover for injury to the shipment. (*Wabash R. Co.* v. *United States*, 178 Fed. 5, 21 Ann. Cas. 819, 101 C. C. A. 133; *Atchi-*

son etc. Ry. Co. v. *United States,* 178 Fed. 12, 101 C. C. A. 140; *Kansas City etc. Ry. Co.* v. *McCunningham* (Tex. Civ. App.), 149 S. W. 420; *Fort Worth & D. C. Ry. Co.* v. *Fort Worth Horse & M. Co.* (Tex. Civ. App.), 180 S. W. 1170; *Jeffries* v. *C., B. & Q. Ry. Co.,* 88 Neb. 268, 129 N. W. 273; *Eustrom* v. *N. P. Ry. Co.,* 208 Ill. App. 267.)

The trial court refused to give an instruction, tendered by defendant, to the effect that, if Hervey directed the conductor in charge of the train not to stop the shipment at Stockdale, but to go on through to Chicago, the plaintiff should not recover. In our view, upon the testimony cited herein, with no testimony in contradiction, Hervey ostensibly had authority to give such directions. However, if upon a new trial, from the evidence then adduced, it should appear that Hervey's authority was limited, this fact known to the defendant, or the conditions such that the company should have known he was a mere special agent, with no other authority than to act as a mere attendant, or whether he disobeyed instructions, with knowledge thereof by the railway company, or whether he acted, if at all, within the apparent scope of his authority, are questions of fact for determination by the jury. It is conceded that Mr. Parham himself, if he had accompanied the shipment, could have directed the same to pass through Stockdale without stopping. Whether his agent or "shipper" has similar authority would ordinarily be a question for the jury.

Error is assigned because the court received in evidence over [7] defendant's objection secondary evidence of notice of claim of loss served upon defendant, without a demand for the production of the original having been made upon the defendant. This we think was error. However, there was valid proof of service of notice upon the Rock Island road within the time fixed by the contract, which in itself was sufficient. (*Northern Pac. Ry. Co.* v. *Wall,* 241 U. S. 87, 60 L. Ed. 905, 36 Sup. Ct. Rep. 493.) The reception of this evidence, therefore, was not prejudicial to the defendant.

Error is assigned because, in instructing the jury as to the [8] measure of damages, the court did not limit the recovery to a sum not exceeding that stated in the notice of claim. A notice of claim is solely to put the railway company on inquiry as to the facts upon which the claim is based, so that it may be informed as to the situation and conditions, at a time when the evidence may be more easily investigated, and possibly before recollection of the facts may have disappeared from the minds of those familiar therewith, and in order that there may be no unreasonable delay in bringing actions. That a notice of claim is for a less sum than the damage actually sustained should be no bar to recovering the larger amount, except possibly in cases where the sum claimed has been tendered in settlement. (See *Pecos & N. T. Ry. Co.* v. *Holmes* (Tex. Civ. App.), 177 S. W. 505; *Texas & P. Ry. Co.* v. *McMillen* (Tex. Civ. App.), 183 S. W. 773.)

It is also contended that the court erroneously stated the law in other respects as to the measure of damages. However, we think the instruction was not open to either objection.

Specifications of error are assigned upon other instructions, which we think it not necessary to specifically discuss, as similar questions are disposed of herein.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

Reversed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, MATTHEWS and COOPER concur.

NOYES ESTATE, RESPONDENT, v. GRANITE-ALASKA CO., APPELLANT.

(No. 4,458.)

(Submitted March 8, 1920. Decided April 8, 1920.)

[189 Pac. 225.]

Mortgages—Action to Compel Release—Intention of Parties—Parol Evidence—Admissibility.

1. In an action seeking the release of a mortgage, parol evidence was admissible to show that in addition to the sum of money mentioned in it as being secured by it, it was intended to secure future advances by the mortgagee to the mortgagor, as well as to secure defendant company's president against personal liability on a promissory note made to a third person for the benefit of the mortgagor.

Appeal from District Court, Silver Bow County; Edwin M. Lamb, Judge.

ACTION by the Noyes Estate, a corporation, against the Granite-Alaska Company. From a judgment for plaintiff, the defendant appeals. Reversed.

Mr. James E. Murray and *Mr. J. F. Emigh*, for Appellant, submitted a brief; *Mr. Murray* argued the cause orally.

Mr. E. B. Howell, for Respondent, submitted a brief, and argued the cause orally.

MR. JUSTICE HURLY delivered the opinion of the court.

The complaint in this case alleges that on the twenty-seventh day of June, 1917, the plaintiff, being indebted to defendant [1] Granite-Alaska Company, for the purpose of securing said indebtedness executed and delivered to said defendant a certain mortgage, and thereafter and on August 31, 1917, for the purpose of further securing said indebtedness, delivered to defendant Daly Bank & Trust Company of Butte an assignment by which said bank was authorized and directed to pay

to said Granite-Alaska Company all moneys which might be paid into said bank by the Anaconda Copper Mining Company upon a certain option for the purchase of the interest of the plaintiff in certain properties. It is further alleged that the plaintiff has fully paid the indebtedness secured by said mortgage and assignment and fully performed all the conditions thereof; that it has demanded of the Granite-Alaska Company a release of said mortgage and a surrender of said assignment, but that the defendant Granite-Alaska Company for the space of more than seven days neglected and refused and still neglects and refuses to discharge or release the said mortgage or surrender the said assignment. For relief the plaintiff demands the sum of $100 statutory penalty for failure to release the mortgage; that the defendant Daly Bank & Trust Company be restrained from paying to defendant Granite-Alaska Company any sum or sums that may be paid into said bank upon said option; that the defendant Granite-Alaska Company be required to execute and acknowledge a release of said mortgage; and that said assignment be surrendered by the Daly Bank & Trust Company to the plaintiff, together with any sums of money which said bank may receive upon said option prior to the date of judgment. The defendant Daly Bank & Trust Company entered no appearance.

The answer of the defendant Granite-Alaska Company admits the delivery and execution of the mortgage to it and the delivery of the assignment to the Daly Bank & Trust Company as alleged in the complaint. The answer further denies generally each and every allegation in the complaint except as otherwise admitted. For a separate and affirmative defense, said defendant alleges the execution of the mortgage referred to in plaintiff's complaint; that said mortgage was given by plaintiff to secure the payment of a certain promissory note of the Noyes Estate to the Granite-Alaska Company, defendant herein, for the sum of $25,000 and interest thereon at the rate of eight per cent per annum from the twenty-seventh day of June, 1917, until paid, and, further, for the purpose of secur-

ing the defendant Granite-Alaska Company for any future advances which might be made by said defendant to the said plaintiff and to secure T. J. Murray, president of said defendant, for any obligations that might be incurred by him in connection with the management or financing of the said Noyes Estate, a corporation; that said mortgage, among other things, contained provisions as follows: "This mortgage is given as security for the following obligations:" There is then set forth a copy of the promissory note signed by plaintiff in favor of defendant Granite-Alaska Company for $25,000, above referred to, followed by clause reading: "(2) Future advances made by the mortgagee to the mortgagor not exceeding the sum of one hundred and fifty thousand dollars, with interest at eight per cent per annum."

It is further alleged that at the time of the execution of said mortgage plaintiff was indebted to the Penn Mutual Insurance Company of Philadelphia upon a certain promissory note in the sum of $150,000, and that the plaintiff was at said time failing to make the payments on said obligation as required by the terms thereof, and that at the time of the execution of the said mortgage T. J. Murray was the president and owner of all the capital stock of the Granite-Alaska Company except two shares thereof; that the plaintiff and its officers knew that said Murray was the president of said defendant corporation and the owner of such stock; and that the plaintiff and its officers knew that the said Murray, for the purpose of securing the aforesaid loan from the Penn Mutual Insurance Company, had extended his personal credit to said corporation by joining in the execution of the said promissory note to the said Penn Mutual Insurance Company and had become personally liable upon said obligation. It is further alleged that it was mutually understood and agreed by and between the plaintiff and this defendant and said Murray that the mortgage hereinbefore referred to was made and executed and should stand as security to said defendant and to said Murray for the payment of the obligation incurred in the execution of the aforesaid note, and that

the said mortgage should be and remain in full force and effect until the said note to the Penn Mutual Insurance Company should be fully paid. It is further alleged that by reason of a mistake in drawing the mortgage the same does not clearly express the true consideration and purpose of said mortgage. It is further alleged that said note to Penn Mutual Insurance Company has never been paid, and that by reason of these facts the obligation of the plaintiff under the said mortgage has not been fully performed, and that said mortgage is still in full force and effect, and that the defendant is entitled to hold said mortgage to secure the said T. J. Murray. The defendant further alleges that it has no interest in the controversy existing between the plaintiff and the said Murray except as above set forth, and is willing and now offers to cancel and release said mortgage whenever the plaintiff shall fully pay and discharge its liability to the Penn Mutual Insurance Company on said note.

To the answer of the defendant Granite-Alaska Company the plaintiff demurred upon the ground that the same fails to state facts sufficient to constitute a defense or counterclaim. The demurrer was sustained, and the defendant Granite-Alaska Company failed to further plead. Judgment was thereupon entered in favor of the plaintiff in accordance with the prayer of the complaint. From that judgment this appeal was taken.

The only real point in controversy is whether the answer of the Granite-Alaska Company sets forth sufficient facts to permit of proof that the real consideration for the mortgage was as alleged therein.

In *Hall* v. *Tay*, 131 Mass. 192, it appeared that Tay and wife executed a mortgage upon lands belonging to the wife to Hall, who was a member of a firm engaged in selling coal, for the purpose of obtaining coal from Hall's firm. Thereupon the firm of which Hall was a member sold to Tay three cargoes of coal. He failed to pay for the same, and in an action instituted by Hall upon the mortgage it was contended that, the mortgage being to Hall individually, he could not show by

parol that the debt secured was in fact to the firm and that it was the purpose to secure future sales or advances. The court said: "When a mortgage on its face is for the payment of a specific sum of money, it may be shown that its purpose was security for future advances which might be made from time to time. (*McKinster* v. *Babcock*, 26 N. Y. 378, 381.) In *Shirras* v. *Caig*, 7 Cranch, 34, 3 L. Ed. 260 [see, also, Rose's U. S. Notes], it was held that a deed purporting to secure the repayment of £30,000 may stand as security for the repayment of part of that sum, and for the indemnity of the mortgagee from liabilities, if there be no fraudulent intent. It was said by Chief Justice Marshall, in delivering the judgment: 'It is true that the real transaction does not appear on the face of the mortgage. The deed purports to secure a debt of £30,000 sterling due to all the mortgagees. It was really intended to secure different sums, due at the time from particular mortgagees, advances afterward to be made, and liabilities to be incurred to an uncertain amount. It is not to be denied that a deed, which misrepresents the transaction it recites, and the consideration on which it is executed, is liable to suspicion. It must sustain a rigorous examination. It is, certainly, always advisable fairly and plainly to state the truth. But if, upon investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed, of his real equitable rights, unless it be in favor of a person who has been, in fact, injured and deceived by the misrepresentation.'

"We can see no reason why, in the absence of any specific statement in the mortgage as to the character of the advances, parol evidence may not be introduced to identify and prove what advances were in fact intended by the parties. It is competent for the purpose of showing the actual consideration. There certainly would be no objection to it if the mortgage had been made in the same terms to the firm by name. And if made to one of the firm for the benefit of the firm, and, in con-

sequence thereof, the advances were made by the firm, evidence of the actual advances made by the firm would be competent. Such evidence has no tendency to vary or control the written instrument, but merely to show what the particular advances were, intended to be secured under the general terms of the mortgage. And it is no objection to the evidence that it necessarily proves that Hall therefore took the deed, not in his individual capacity, but as acting for and in behalf of his firm. If the evidence shows that the advances referred to in the mortgage were advances by the firm, and that it was so understood by the parties, and it was intended that the mortgage should stand as security for such advances, then Hall would hold as trustee for the firm under a resulting trust, the firm having made actual advances which the mortgage was given to secure. Evidence to establish such facts would be competent. (*Jackson* v. *Stevens*, 108 Mass. 94; *Pond* v. *Eddy*, 113 Mass. 149; *Jones* v. *Guaranty & Indemnity Co.*, 101 U. S. 622, 25 L. Ed. 1030 [see, also, Rose's U. S. Notes].)"

In *Johnson* v. *Bratton*, 112 Mich. 319, 70 N. W. 1021, the court said: "The general rule is that you cannot import into a written agreement a parol agreement which alters the terms or legal effect of the written agreement. * * * An exception to this rule, however, is made in relation to mortgages (17 Am. & Eng. Ency. Law, 454), and parol evidence is admissible to identify the future advances intended to be secured by a mortgage. Though the mortgage, on its face, is for the payment of a specific sum of money, parol evidence is admissible to show that it was really intended to secure future advances made from time to time. * * * We think it was not error to allow parol proof of what the facts were about the giving of the mortgage, what debt it was to secure, and for whose benefit it was made."

In the foregoing case the mortgage was on its face in favor of an individual to secure a promissory note for $1,500, whereas the intent of the parties was that the mortgage should be security to a firm, of which the person named as mortgagee

was a member, to secure, not only an existing indebtedness, but also future advances to be made by such firm by the sale of goods to the mortgagor.

As illustrative of the foregoing doctrine, see the following authorities: Jones on Mortgages, 7th ed., secs. 170, 367a, 846; *Price* v. *Brown*, 98 N. Y. 388; *Lawrenceville Cement Co.* v. *Parker*, 60 Hun, 586, 15 N. Y. Supp. 577; *Banta* v. *Wise*, 135 Cal. 277, 67 Pac. 129; *Anglo-Californian Bank* v. *Cerf*, 147 Cal. 384, 81 Pac. 1077; *Wilkerson* v. *Tillman*, 66 Ala. 532.

We are of opinion that, if the facts are as pleaded by the Granite-Alaska Company, the defendant for its own protection had the right to refuse to satisfy the mortgage until Murray had been released from the indebtedness to the Penn Mutual Insurance Company, and that the answer sufficiently pleaded the defense in that regard; also, it would be competent for the defendant upon a trial to introduce parol testimony to establish the allegations of the answer, if such testimony exists.

The judgment is reversed.

Reversed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, MATTHEWS and COOPER concur.

STATE EX REL. WOOTEN, RELATOR, *v.* DISTRICT COURT ET AL., RESPONDENTS.

(No. 4,584.)

(Submitted March 8, 1920. Decided April 8, 1920.)

[189 Pac. 233.]

Prohibition—Husband and Wife—Annulment of Marriage—Temporary Alimony—Power of District Court.

Prohibition—When Appeal No Bar to Writ.

1. Where the remedy by appeal from an order allowing alimony *pendente lite*, attorney's fees and suit money is not adequate or speedy, the fact that an appeal lies is not sufficient reason for denying the writ of prohibition against the enforcement of the order.

Same—Extent of Review by Supreme Court.

2. In determining whether the district court exceeded its jurisdiction in making an order of the nature of the above in an action for annulment of marriage asked for on the ground that defendant wife was physically incapable, the supreme court may examine not only the pleadings but the evidence before the trial court.

Husband and Wife—Marriage—Annulment—No Statutory Authority for Temporary Alimony.

3. Held, that in an action for the annulment of marriage on the ground of defendant wife's physical incapacity, there is no statutory authority for allowing her alimony *pendente lite*, attorney's fees and suit money.

Same—Annulment of Marriage—Power of District Court to Grant Temporary Alimony.

4. *Held*, that though the district court has no statutory authority to do so, it may, under its equity jurisdiction in such matters, grant temporary alimony, attorney's fees and suit money to the wife in a suit by the husband for the annulment of the marriage on the ground of her physical incapacity, such power continuing during the pendency of the suit, in the district court or in the supreme court on appeal.

[As to the power of court to grant alimony *pendente lite* and counsel fees in action to annul marriage, see notes in 5 Ann. Cas. 380; 20 Ann. Cas. 1347.]

Original application for Writ of Prohibition on the relation of Charles F. Wooten, against the District Court of Silver Bow County and Joseph R. Jackson, a judge thereof. Application dismissed.

Messrs. Nolan & Donovan, for Relator, submitted a brief; *Mr. L. P. Donovan* argued the cause orally.

Mr. Wm. Meyer and *Mr. Maurice J. English*, for Respondents, submitted a brief; *Mr. Meyer* argued the cause orally.

The district court had jurisdiction to award temporary alimony, suit money and attorneys' fees in the annulment action. (See *Dunphy* v. *Dunphy*, 161 Cal. 92, 118 Pac. 445; *Higgins* v. *Sharp*, 164 N. Y. 8, 58 N. E. 10; *Hunt* v. *Hunt*, 23 Okl. 490, 22 L. R. A. (n. s.) 1202, 100 Pac. 541; 26 Cyc. 918; 1 R. C. L. 905, sec. 52; *Ricard* v. *Ricard*, 143 Iowa, 182, 136 Am. St. Rep. 762, 20 Ann. Cas. 1346, 26 L. R. A. (n. s.) 500, 121 N. W. 525; *Poupart* v. *District Court*, 34 Nev. 336, 123 Pac. 769.)

On right to temporary alimony on annulment of marriage, see notes in 3 L. R. A. (n. s.) 192; 26 L. R. A. (n. s.) 500.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

Relator brought action in the district court of Silver Bow county for the annulment of his marriage under section 3636, Revised Codes, on the grounds that: (a) His consent was obtained by the fraud of the defendant; and (b) that the defendant was physically incapable of entering into the marriage relation. Having denied generally the allegations of fraud and incapacity, the defendant applied for and was allowed alimony *pendente lite*, attorney's fees and suit money, and from the order relator appealed; whereupon defendant made application for and was allowed further alimony, suit money, and attorney's fees, over the objection of relator, to enable her to defend against the appeal. Relator then instituted this proceeding for a writ of prohibition against the enforcement of the order last mentioned, and the making of any further orders of a similar character. Respondents moved to quash on the ground that the relator is not entitled to the relief demanded, for the reason that his petition does not state facts sufficient to warrant this court in granting him such relief and that he has a plain, speedy and adequate remedy at law, citing section 7228, Revised Codes: *State ex rel. Browne* v. *Booher*, 43 Mont. 569, 118 Pac. 271, *State ex rel. Topley* v. *District Court*, 54 Mont. 461, 171 Pac. 273, and *Poupart* v. *District Court*, 34 Nev. 336, 123 Pac. 769.

[1] While an appeal lies from an order allowing alimony (*State ex rel. Nixon* v. *District Court*, 14 Mont. 396, 40 Pac. 66; *Bordeaux* v. *Bordeaux*, 32 Mont. 159, 80 Pac. 6), it is obvious that an appeal is not adequate in this case, for each successive appeal taken would be the basis for a new application and a further order for alimony *pendente lite*, attorney's fees and suit money to defend on such appeal. Neither would the appeal be speedy, since the action is not one calling for advancement on the calendar and the case would be disposed of on its merits long before the appeal could be heard.

Section 7227, Revised Codes, provides: "The writ of prohibition * * * arrests the proceedings of any tribunal, corporation, board or person, whether exercising functions judicial or ministerial, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person."

In the case of *State ex rel. Scharnikow* v. *Hogan*, 24 Mont. 379, 51 L. R. A. 958, 62 Pac. 493, this court held that, under Article VIII, section 3, of the Constitution, the foregoing section could not confer on the supreme court the power to issue the writ of prohibition to arrest proceedings not of a judicial nature; but this ruling does not affect the question before us, as we are here dealing with a judicial function.

Under section 7228, the writ may be issued "in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." (*State ex rel. Lane* v. *District Court*, 51 Mont. 503, L. R. A. 1916E, 1079, 154 Pac. 200.) If, then, under the [2] facts above stated, it appears that the district court was without jurisdiction to make the order complained of, the writ of prohibition is the proper remedy. In considering the question this court may examine, not only the pleadings but the evidence before the lower court, in order to determine whether the lower court is about to exceed its jurisdiction. (*State ex rel. Boston & M. Consol. Co.* v. *District Court*, 22 Mont. 220, 56 Pac. 219.)

The complaint alleges that the plaintiff and defendant intermarried in June of 1919, and "ever since have been and are now husband and wife," and then alleges fraud on the part of the defendant, and that at the time of the marriage she was afflicted with a contagious and infectious disease of a deadly character, which appears to be incurable; that the plaintiff was induced to enter into marriage relation by false representations; and that, if it had not been for such false representations and concealment practiced upon him, he would never have consented to such marriage. He further avers that, as soon as he discovered the true conditions, he left the defendant and has not since cohabited with her. All these allegations are de-

nied by defendant's answer, except as to the marriage and that plaintiff and defendant "ever since have been and are now husband and wife."

The defendant was placed on the stand and established the fact of the marriage, and, on cross-examination, admitted that, just prior to the time plaintiff left her, she was advised by a physician that she was afflicted as charged, and that she told her husband what the doctor had said. A card or chart from the State Department of Health, showing the result of a "Wasserman test" as "4 plus," which indicates, according to the chart, "very strongly positive," or the highest reaction for syphilitic infection, was admitted in evidence, and defendant admitted that she was shown the card just prior to the time her husband left her. She further admitted that, if she was so infected, the infection dated from the time of cohabitation with her former husband and antedated her marriage to plaintiff. She testified further, however, that she had never shown external evidence of such infection, and that she was twice thereafter examined by other physicians who also had such a test made, and that the result of such test was negative. There was no attempt made on the part of the plaintiff to establish fraud or misrepresentations prior to her marriage, or that, if infected, defendant knew of her condition prior thereto; on the contrary, the defendant testified that she was in good health and sound bodily condition at that time. She further testified that she was five months along with child and that she is without means of support or for the defense of the action.

It is contended that the court is without jurisdiction to grant temporary alimony, suit money or counsel fees in an action to annul a marriage, for the following reasons: (1) The statutes of the state confer no authority upon the court to grant the same in such an action. (2) The provisions of the statutes are exclusive and are the measure of the court's authority in matrimonial actions.

1. Taking up the reasons assigned in the order stated, we will first consider the history of this legislation in Montana.

That the courts of this state have no inherent power, either as courts of law or equity, to dissolve marriage, and that the power to decree a divorce is purely statutory, has been determined by this court. (*Rumping* v. *Rumping*, 36 Mont. 39, 12 Ann. Cas. 1090, 12 L. R. A. (n. s.) 1197, 91 Pac. 1057.) This is so because of the fact that, at the time our forefathers brought with them the common law of England, neither courts of law or equity had jurisdiction in such matters; they being handled exclusively by the ecclesiastical courts. (2 Bishop on Marriage and Divorce, 431.) The first legislative assembly of the territory, therefore, provided for actions for divorce, on grounds which are now recognized as applying only to annulment proceedings, as well as those for divorce proper, and provided for the granting of alimony, both permanent and temporary, in all such actions. (Laws of Montana, First Sess. 1864–65, p. 430.) These provisions were carried forward to the Acts of the Seventh Session, 1871–72, page 457, and were later included in the Revised Statutes of 1879, pages 513, 514, and thereafter incorporated in the Compiled Statutes of 1887, as sections 999 to 1006, inclusive.

Although it thus appears that up to 1895 the successive legislative assemblies of this state did not recognize the fact, there is a clear distinction between actions for the annulment of a marriage on pre-existing grounds and those for the dissolution of such a contract for acts committed after its solemnization. The first recognizes but a ceremonial or formal contract and repudiates the idea that there ever was in fact a marriage between the parties, and the decree of the court, when made, declares the marriage null and void *ab initio;* while the latter recognizes the validity of the marriage and seeks a decree dissolving the bonds because of the wrongful act of one of the parties during the existence of the marriage relation. "While a suit for nullity follows substantially the same rules as a suit for divorce, yet it cuts deeper into the soil of consequences than the divorce suit, because the interests and rights of third persons are more affected by it. The children especially have their

legitimacy or illegitimacy irrevocably established by this suit, while they do not by a suit for divorce. Therefore it has been said to be a more privileged suit, and it excites to even greater degree the vigilance and caution of the courts." (2 Bishop on Marriage and Divorce, 294.)

In codifying the laws of the state in 1895, the legislature recognized the error made theretofore and separated the two classes of causes of action. (Codes 1895, secs. 110–203, inclusive.) These sections are found in Chapter 2 of Title I of the Civil Code. The Chapter is entitled "Divorce" and is subdivided as follows: Article I: Nullity. Article II: Dissolution of Marriage. Article III: Causes for Denying Divorce. Article IV: General Provisions. This Chapter was carried forward to the Revised Codes of 1907, with but one minor amendment, and the only changes made therein are that the title to Article I now reads "Annulment of Marriage," instead of "Nullity," and the sections are given different numbers in accordance with the new arrangement of the Codes. (Secs. 3636–3689, Rev. Codes.) Section 3677 (191) of Article IV of the Chapter provides: "While an action for divorce is pending the court or judge may, in its or his discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action." It also provides for actions for support and maintenance, and that "during the pendency of such action the court, or judge, may, in its or his discretion, require the husband to pay as alimony any money necessary for the prosecution of the action and for support and maintenance," *etc.* It will be noted that the foregoing provisions—and they are the only provisions in the Codes on the subject of alimony—make no reference to actions for the annulment of a marriage.

While it is true that, from 1865 to 1895, the laws of this state specifically empowered the court to grant temporary alimony in this class of cases, as well as actions for divorce, by including both classes of actions in one section, as we have heretofore seen, on the adoption of the Codes with its new classifi-

cation of these two subjects, all the laws on the subject then in effect (secs. 999–1006, Comp. Stats. 1887) were specifically repealed by section 4673 of the Codes of 1895, now section 6235 of the Revised Codes. And, if there still remained any doubt as to whether such sections remained in force, it was further provided that "the Code establishes the law of this state respecting the subjects to which it relates." (Sec. 6214, Rev. Codes.) And: "No statute, law, or rule, is continued in force because it is consistent with the provisions of this Code on the same subject; but in all cases provided for by this Code, all statutes, laws, and rules heretofore in force in this state, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed or abrogated." (Sec. 6234, Rev. Codes.)

It is therefore evident that whatever statutory authority the court now has in awarding alimony must be found in said section 3677, Revised Codes.

It is urged by respondents' counsel that, as said section is found in "General Provisions" at the end of Chapter 2 of the Civil Code, which Chapter is entitled "Divorce," and Article I, on "Nullity" or "Annulment of Marriage," being a part of that Chapter, it was intended that such general provisions should apply generally to all actions provided for in the Chapter. The Chapter was, undoubtedly, taken bodily from the California Code, including its arrangement and titles, and, while ordinarily the arrangement and titles in the Codes are given no weight in construing statutes, for the reason that they are usually the work of codifiers rather than that of the legislative assembly, the fact that the Chapter was so adopted by the legislative body itself might have some persuasive force, were it not for the provisions of section 3562 of our Codes, which reads as follows: "(3) The arrangement and classification of the several parts of said Codes have been made for the purpose of convenience and orderly arrangement, and therefore no implication or presumption of a legislative construction is

to be drawn therefrom, nor shall annotations be deemed any part of the statutes."

It would therefore seem that no presumption in favor of the court's authority can arise from the fact that this proceeding was brought under Article I of the Chapter entitled "Divorce"; the Article might be taken from the Chapter and placed in any other part of the Code "for the purpose of convenience and orderly arrangement," and would then have not the remotest connection with those sections contained in the article on "General Provisions."

Section 3677 authorizes the court to grant temporary alimony in but two classes of cases, to-wit: "While an action for [3] divorce is pending," and "during the pendency of" actions for support and maintenance. We are impelled, therefore, to the conclusion that there is no statutory authority in this state for the making of such an award as that complained of.

2. Are the statutory provisions the exclusive measure of the court's jurisdiction in cases involving the marital relation?

The overwhelming weight of authority answers the question in the negative and holds that the right to award alimony in matrimonial cases is a part of the fundamental jurisdiction of courts of equity in all cases where authority is granted to the courts to hear and determine such causes, and this court has, to some extent at least, recognized such a rule. Thus, in the case of *Edgerton* v. *Edgerton*, 12 Mont. 122, 33 Am. St. Rep. 557, 16 L. R. A. 94, 29 Pac. 966, decided in 1893 and prior to the enactment of the statute permitting the court to award alimony, *etc.*, in separate maintenance actions, apart from divorce, and before, by statute, such an action was maintainable, this court held that "An action of this character if maintainable at all, would naturally lie within the equitable jurisdiction of the district court." After quoting the statutes heretofore cited, the court said: "It is contended that these provisions of the statute as to the decree for alimony and maintenance 'when divorce is granted,' by implication, exclude from

the courts the jurisdiction to enforce the maintenance, except in an action where divorce is decreed. Some have so held, but upon this phase of the question, as upon nearly all aspects of it, eminent authorities are opposed to one another in the views entertained. Our own conclusion upon this particular feature of the question is that the great weight of reason is against the idea that the legislature, in adopting the statute referred to, intended any regulations of the right of the wife to maintenance.'' After discussing the history of equitable jurisdiction and particularly that concerning actions as between husband and wife, the court concludes: ''We will close the inquiry upon this branch of the case by bringing to view certain statutory and constitutional provisions of this state, which to some extent, we think, should influence our determination. The statute provides that: 'Women shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman which her husband does as a man.' * * * (Sec. 1439, Div. 5, Comp. Stats.) Our Constitution provides that 'the district courts shall have original jurisdiction in all cases at law and in equity, * * * and for such special actions and proceedings as are not otherwise provided for.' (Sec. 11, Art. VIII.) And, further, that 'there shall be but one form of civil action, and that law and equity may be administered in the same action.' (Sec. 28, Art. VII.) And, further, that 'courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and that right and justice shall be administered without sale, denial or delay.' (Sec. 6, Art. III.) * * * The court is then confronted with the question whether there shall be a denial of enforcement of this right, except where absolute divorce is granted. We think the intendment of our Constitution and statutes is to negative that proposition.''

In the case of *Finkelstein* v. *Finkelstein*, 14 Mont. 1, 34 Pac. 1090, the court recognized the distinction between an action for divorce and annulment, and, although the statute then per-

mitted the granting of alimony in all actions for "divorce" on the grounds mentioned in the Compiled Statutes of 1887, then in force, determined the question here before us on fundamental grounds, regardless of the statute, when it said: "Of course, one of the essential facts to plaintiff's cause of action is that she is the wife of defendant. If that fact is not present, plaintiff has no case. But on the hearing of a motion for alimony *pendente lite,* it is not for the district court to finally determine that fact. The question is whether there is a sufficient *prima facie* showing of the alleged fact of marriage. * * * It may be true that, if on a motion for alimony *pendente lite,* the defendant shows facts and conditions which absolutely establish that there is no marriage, and that plaintiff is not the wife of defendant, it would not be proper to grant such alimony. But there is no such showing in this case. To recapitulate, the district court had before it this situation: A direct allegation of marriage by the plaintiff, which the defendant denied." Again the court said: "The plaintiff alleges marriage and the present existence of the relation of husband and wife. The defendant sets up facts which he claims, if true, show that there was no marriage and no relation of husband and wife. In our opinion this leaves the matter of marriage simply in the condition of a contention between the parties." The court held, in effect, that, where there is an allegation of marriage and a denial thereof, the facts so alleged present a sufficient *prima facie* case for the award of temporary alimony, suit money, *etc.,* and this *prima facie* case must be thoroughly defeated and the defense fully established by the husband, before he will be relieved. Cases in support of the rule are cited in plaintiff's brief in that case.

In the case of *Twell* v. *Twell,* 6 Mont. 19, 9 Pac. 537, this court held that proceedings for divorce and alimony are of chancery jurisdiction and that the power to decree alimony falls within the general powers of a court of equity.

In the case of *Galland* v. *Galland,* 38 Cal. 265, the supreme court of California said: "There is no provision of the statute

which authorizes an application for alimony, except in connection with a prayer for divorce; and it is claimed on behalf of the defendant that, inasmuch as provision is made for the allowance of alimony only on an application for divorce, it was the intention of the legislature to limit the power of the court to grant alimony to that class of cases. The maxim '*expressio unius est exclusio alterius*' is invoked as applicable to this proposition. But, in my opinion, it has no application to the case. The main subject matter of the statute was the regulation of divorce; and only as incidental to that subject the statute prescribes the power of the court in respect to alimony in that class of cases. The legislature was not dealing with the general subject of alimony, as an independent subject matter of legislation, but only as one of the incidents of an application for divorce." The court concludes that the power to award alimony falls within the general powers of a court of equity, and exists independent of statutory authority.

As we have heretofore stated, Chapter 2 of the Code of 1895 is identical with the laws of California on the subject, and, under such identical provisions, the court there held that, in an action by the husband to annul the marriage on the ground of fraud, the superior court had authority to award the defendant such an amount as was necessary to enable her to present her defense; the court saying: "Until her alleged fraud is established, she remains the lawful wife of the petitioner, and has the same right to defend the action to annul the marriage that he has to prosecute it, and until she is provided with the means * * * to make her defense, she ought not to be forced into a trial." (*Allen* v. *Superior Court*, 133 Cal. 504, 65 Pac. 977.) And later, in construing these provisions, in a case on all-fours with this, that court said: "For all the purposes of the annulment action, so long as the action is pending, to use the language of *Brinkley* v. *Brinkley*, 50 N. Y. 186, 10 Am. Rep. 460, 'the relation actually exists upon which the right to alimony depends.' So that, even if section 137 of the Civil Code, providing for alimony and cost money in an 'action for

divorce,' does not by its terms include actions for annulment, the weight of authority is in favor of the existence of the power as to cost money, notwithstanding the absence of express statutory authority, and by reason of the general jurisdiction expressly conferred to entertain such actions; and *Allen* v. *Superior Court*, 133 Cal. 504, 65 Pac. 977, must be taken as deciding that such power exists in this state. In view of what we have said, it must also be held that such power exists so long as the annulment action is pending. But there is much force in the claim that the term 'action for divorce,' in section 137, Civil Code, includes such actions for annulment as are provided for in sections 81 and 82 of the Civil Code. Section 137 is a part of Article IV of Chapter 2, Title I, Part III of the Civil Code, an Article entitled 'General Provisions.' Chapter 2 is entitled 'Divorce,' and contains four Articles; Article I being entitled 'Nullity' * * * [being the same arrangement as ours]. It is apparent that the term 'Divorce,' constituting the title of Chapter 2, was used as including annulment proceedings, as well as divorce proceedings, for causes occurring after marriage; and it may well be argued that such provisions in the subdivision entitled 'General Provisions' as are appropriate in actions for annulment are applicable thereto. However, it is not necessary to definitely decide this question here, in view of what we have already said." (*Dunphy* v. *Dunphy*, 161 Cal. 92, 118 Pac. 445.)

The New York court of appeals, in the case of *Higgins* v. *Sharp*, 164 N. Y. 8, 58 N. E. 10, laid down the rule that "the general jurisdiction conferred by the statute to entertain such actions carries with it, by implication, every incidental power necessary for its proper exercise. * * * The power to allow alimony and counsel fees to the wife in order to enable her to live pending the action, and to present her defense, if she has one, must be regarded as incidental and necessary in all matrimonial actions. Without such power the rights of the woman, in many cases, could not be adequately protected. It seems to us, therefore, that actions to annul a marriage are

governed, with respect to alimony and counsel fees, by the same principles as all other actions for divorce. When the court was vested with the jurisdiction in such cases, the incidental power to guard and protect the rights of the wife, which had always been regarded as a part of the jurisdiction, necessarily followed and attached, upon the plainest principles of reason and justice." In that case, as here, it was argued that the jurisdiction of the court, in matrimonial cases, is derived solely from statutes, and that, in the absence of statutory authority, the court was without jurisdiction to award alimony in such cases. The case of *Higgins* v. *Sharp*, above, was approved and followed in *Hunt* v. *Hunt*, 23 Okl. 490, 22 L. R. A. (n. s.) 1202, 100 Pac. 541, and in *Willits* v. *Willits*, 76 Neb. 228, 14 Ann. Cas. 883, 5 L. R. A. (n. s.) 767, 107 N. W. 379, and a similar rule announced in *Bird* v. *Bird*, 1 Lee Ch. 621; *Miles* v. *Chilton*, 1 Rob. Ecc. 684; *Vandegrift* v. *Vandegrift*, 30 N. J. Eq. 76; *Griffin* v. *Griffin*, 47 N. Y. 134; *North* v. *North*, 1 Barb. Ch. (N. Y.) 241, 43 Am. Dec. 778; *Smith* v. *Smith*, 1 Edw. Ch. (N. Y.) 255; *Ricard* v. *Ricard*, 143 Iowa, 182, 136 Am. St. Rep. 762, 20 Ann. Cas. 1346, 26 L. R. A. (n. s.) 500, 121 N. W. 525; *Poupart* v. *District Court*, above; *Stapleberg* v. *Stapleberg*, 77 Conn. 31, 58 Atl. 233.

While there are cases—some of them well reasoned and logical—to the contrary, all the modern writers on the subject agree that, where there has been a marriage ceremony performed the validity of which is denied by the husband and asserted by the wife, the latter is entitled to alimony *pendente lite*, suit money and attorney's fees; for the validity of the marriage is the subject in controversy, and the court cannot decide the merits of such a controversy on such preliminary application, with the exception that, where, on the preliminary hearing, if it clearly appears that there was no marriage and that the wife cannot prevail in the action, the court will refuse to grant the application. Thus, in 29 Cyc. 918, the rule is laid down as follows:

"As a general rule, the right to alimony depends on a valid and subsisting marriage, since without this there is no obligation for the support of the alleged wife, and before it can be claimed or allowed, the marriage must be proved or admitted, or, if it is contested, there must appear to the court a fair probability that it will be established (citing cases). Hence, where a wife brings suit for the annulment of the marriage, thereby denying the fundamental fact on which a claim for alimony should be based, no allowance can be made for her support pending the action, or for suit money (citing a large number of cases), unless it be authorized by statute (citing cases).

"On the other hand, where the husband brings the suit and the wife defends, asserting the validity of the marriage, she is in a position to claim alimony *pendente lite* and an allowance for the expenses of the suit and for counsel fees, and it will be granted to her on a proper showing (citing cases). But, of course, it is otherwise if the wife as defendant admits that the marriage was null and void. Permanent alimony cannot be granted in cases of this kind for, if a decree is granted in accordance with the prayer of the petition, it must adjudge the pretended marriage void *ab initio*, and consequently that the parties never sustained the relation of husband and wife."

"Where an actual marriage is shown, and its existence in law is sought to be avoided by some fact set up by the husband, unless he proves that fact, the alleged wife is entitled to temporary alimony. Where the husband denies in his answer that a valid marriage ever existed, the court still has jurisdiction to allow temporary alimony, but it will not be allowed until some evidence of a valid marriage is shown." (19 C. J. 213, 214, and cases cited.)

And in 1 Am. & Eng. Ency. of Law, page 472, we find the statement: "As regards the marriage which must exist to entitle the wife to a decree for temporary alimony—as the merits are not gone into, the court will be justified in granting the decree if the parties had lived together and adjusted their

property rights on the basis of the validity of the marriage—so alimony *pendente lite* has been allowed in nullity cases (citing cases)."

Under the heading "Annulment Suit by Husband," the author, in 1 R. C. L. 905, declares: "An action to annul a marriage brought by the husband stands on an entirely different footing from such an action brought by the wife, so far as the right to alimony *pendente lite* is concerned. When she is in the position of asserting and defending the validity of her marriage, she may consistently invoke the power of the court to compel a provision for her maintenance until the action has determined the relation of the parties. Her marriage to the plaintiff is presumed to be legal until the contrary is shown, and there is no sound reason in law or in morals why a wife who has had a serious charge made against her should not have the same right of assistance from her husband in defending against his charge that she would have were he asking a divorce (citing cases)."

"The authorities, therefore, almost unanimously hold, even in the absence of express statutory authorization, that where a husband seeks an annulment of the marriage on grounds the existence of which is denied by the wife under oath, she is entitled to an allowance during the pendency of the suit. The fact that the husband thereby admits the existence of the marriage relation *de facto*, taken with the wife's denial of its invalidity, is sufficient to sustain the application, for, as has been shown, the court will not go into the merits of the action at that stage. The question should be governed by the circumstances of the case and rests in the sound discretion of the court, and will not be disturbed on appeal unless that discretion has been abused." (19 C. J. 228.)

On the question as to whether the court has authority to make an award in the absence of statutory provision therefor, Mr. Bishop has this to say: "Let us consider the question sometimes arising in our courts, whether, when a statute gives the tribunal jurisdiction over a specific cause of divorce, but is

silent concerning alimony, or provides only for permanent alimony, the temporary can then be awarded; and whether costs, as they are termed in England, or money to defray the expenses of the suit, can also be given. This question seems plain on principle; first, the authority to make the order belongs to the court under the law imported by our forefathers to this country; secondly, if this were not so, still it springs up necessarily out of the legal relation of the parties, and the condition of facts appearing from the record before the court to which the application is made. And if any one principle of our jurisprudence is more worthy of commendation than another, it is, that a judicial tribunal may always be pressed to action when a case is presented which comes within established legal rule, though not within precedent." (2 Bishop on Marriage and Divorce, sec. 338.) In section 402 of the same work, it is said: "The allowance cannot be made until the fact of marriage has been either admitted or proved. But the marriage need not be valid. * * * Where the man seeks to establish the nullity of his marriage on the allegation that the woman has a former husband living, she may have alimony pending the suit, and money to defend. This question having arisen before Sir George Lee, he observed: 'The man by his suit admitted that he was married to her *de facto;* * * * I must presume, till the contrary appears in evidence, that she was his wife *de jure* as well as *de facto;* for otherwise she must be guilty of bigamy, and is a felon; but the law presumes, on the contrary, everybody to be innocent till they are proved guilty.' The practice here indicated has prevailed ever since this decision."

Here the plaintiff himself sets up the marriage and alleges that "ever since said date plaintiff and defendant have been and are now husband and wife." He then alleges facts which, if true, would render the marriage null and void. The evidence heretofore set out, taken before the district court on the hearing, did not establish the truth of such allegations conclusively, and the court, in the exercise of its discretion, allowed the application of the wife. The testimony so taken

left the question of the validity of the marriage a debatable question, and we cannot say on the record that there was any abuse of that discretion. To have decided otherwise would have been tantamount to a declaration that plaintiff and defendant never had been husband and wife, in disregard of her denials, under oath, of the allegations of the complaint and of her assertion that her marriage is valid and existing; it would be to prejudge the case on its merits.

It is true that, if, on a final hearing, the court finds that the allegations are true, the defendant will not be entitled to alimony, for it will then appear that she never was the wife of the plaintiff, and consequently he was never under legal obligation to her. But on the other hand, if the plaintiff fails in his proof, the defendant will be declared to be his lawful wife, and consequently to have been entitled to support from him from the beginning of the action, yet if she, without means as she has testified, be denied the order prayed for, how is she to combat this most grave charge against her, and who is to support her while the court awaits the final presentation of the case? Until she is adjudged not to be the wife of the plaintiff, he is bound to support her, and, having deserted her, she might, under the statute, bring an action for separate maintenance and in that connection apply for and receive alimony. Why, then, should not a court of equity decree her such alimony pending this action, rather than to force her to a multiplicity of suits? She is presumed to be innocent, as quoted from Sir George Lee, above, until she is proved guilty, and, until such presumption is overcome by competent evidence, she is, as to all the world, the lawful wife of plaintiff and entitled not only to support but to the means necessary to properly meet a charge which will, if proven, deprive her not only of her position as wife, but to a great extent destroy her reputation as a woman, and it would seem that the reasons for awarding a woman, under such circumstances, the means to defend, are more cogent than in the ordinary case of divorce and appeal more strongly to justice and equity.

We are therefore of the opinion that the court, vested with authority to hear and determine actions for the annulment of marriage, has fundamental jurisdiction to grant temporary alimony, suit money, and attorney's fees to the wife, in a suit by her husband, on a proper showing, as a power incidental to the major jurisdiction, though that power does not extend to the granting of permanent alimony on a final disposition of the case in favor of the husband. And that power exists so long as the annulment suit is pending, whether in the district court or in this court on appeal. Under this view of the matter, the lower court had jurisdiction to make the order complained of and acted within such jurisdiction and still has jurisdiction to make like orders, if the necessity therefor arises.

The motion to quash the alternative writ will therefore be sustained and the application dismissed. It is so ordered.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

STATE EX REL. PEW, RELATOR, *v.* PORTER, STATE AUDITOR, RESPONDENT.

(No. 4,594.)

(Submitted April 8, 1920. Decided April 19, 1920.)

[189 Pac. 618.]

Mandamus — State Auditor — Powers — Attorney General — Scope of Duties—State Efficiency and Trade Commission—Assistants—Compensation.

1. Chapter 184, Laws of 1919, authorizes the state efficiency and trade commission to employ persons skilled in the science of state and municipal government to aid it in its investigations. The relator was appointed to prepare for its use a survey of all the state offices, bureaus, *etc.*, as well as a concise digest of the laws governing them. The relator's claim for compensation was approved, but the state auditor declined to draw his warrant for the amount of the claim on

the ground that the services performed by the relator were such as are required to be performed by the attorney general. *Held*, on *mandamus*, that the duties of the attorney general as defined by the Constitution, the statutes and the common law in so far as it is in force in Montana, do not include the rendition of the services performed by relator; that under the Act creating it, the commission is clothed with a wide discretion in carrying its provisions into effect, and that, in the absence of fraud or manifest abuse thereof in the employment of relator, the state auditor was without power to refuse to issue a warrant.

Original application for a writ of *mandamus*, on the relation of Chas. E. Pew against George P. Porter, State Auditor. Writ granted.

Mr. Jas. A. Walsh, for Relator, argued the cause orally.

Mr. S. C. Ford, Attorney General, and *Mr. Frank Wòody*, Assistant Attorney General, for Respondent, submitted a brief; *Mr. Woody* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

By an Act approved March 10, 1919 (Chap. 184, Laws 1919), a state efficiency and trade commission was created, its powers and duties defined, and an appropriation made to defray its expenses. The commission was charged with the duty of making a comprehensive investigation of the financial and business policies of the state, its various offices, bureaus, boards and commissions, for the purpose of detecting abuses, inefficiencies and unnecessary expenditures of public money, devising ways and means for correcting the same, and suggesting a general plan for the economical administration of the business affairs of the state. The commission was required to report to the Governor on or before November 1, 1919, and to include in its report specific recommendations designed to correct the deficiencies found to exist and to prepare and submit proposed legislation necessary to carry the recommendations into effect.

The Act provides, among other things: "The commission is [1] authorized * * * to employ such expert accountants,

persons especially skilled in the science of state and municipal government, stenographers *and other assistants* as shall be necessary to carry out the purpose for which said commission is created." (Sec. 2.)

After its organization, the commission employed C. E. Pew to prepare for its use a complete survey of all offices, boards, bureaus and commissions through the agency of which the business of the state is conducted, and also to prepare a concise digest of the laws governing the creation and the powers and duties of each such office, board, bureau or commission. The employment was accepted and the services performed to the satisfaction of the commission. Thereafter Mr. Pew presented his claim for compensation in the sum of $1,000, which claim was approved, indorsed by the chairman, audited and allowed by the state board of examiners, and a warrant ordered drawn by the state auditor. The auditor refused to draw the warrant and this proceeding was instituted to compel him to do so.

The defendant appeared by motion to quash the alternative writ, and in support of the motion urges that the services required of Mr. Pew were such services as are required to be performed by the attorney general, and therefore the commission was without authority to incur a liability on behalf of the state for such services. There is not any merit whatever in the contention. The duties of the attorney general are defined by the Constitution, by the statutes, and by the common law in so far as it is in force in this state, but nowhere, either by express declaration or by fair intendment, is the attorney general required to perform services of the character indicated. The duties defined by the Constitution attach themselves to the attorney general only by virtue of his membership on particular boards. The duties appertaining to the office at common law are classified and enumerated in general terms in the note to 6 C. J. 809, and the statutory duties are defined by section 193, Revised Codes.

Defendant relies upon the decision of the Oregon court in *Gibson* v. *Kay*, 68 Or. 589, 137 Pac. 864. In that case the cor-

poration commissioner of Oregon appointed one McColloch, a state senator, as his assistant to perform certain services, and the proceeding involved the question of the authority of the commissioner to incur a liability on behalf of the state for such services. The court stated that the duties of the appointee were essentially those of an attorney; that the state had made ample provision for legal advisers for the state and its interests; that the terms "clerks, stenographers and assistants" were not sufficiently comprehensive to include attorneys, but based its decision entirely upon the proposition that a member of the legislative assembly which enacted the statute under which the appointment was made was, by the provisions of the Constitution of Oregon, disqualified to accept the appointment or to render the services. By way of *obiter* the court observed that the duties imposed upon McColloch were such as were required to be performed by the attorney general or district attorneys, but the statutes of Oregon which define the duties of those officers are so much broader than are the provisions of section 193 above that the same rule would not prevail here, if that ground of objection had been considered by the Oregon court as a deciding factor, which was not done.

By the provisions of Chapter 184 above, the commission was clothed with broad, general powers and wide discretion in carrying into effect the purposes of the Act. The legislature saw fit to confer upon the commission the authority to determine what assistants were necessary, and in the absence of fraud or a manifest abuse of discretion its determination is conclusive. There is no provision of law under which the auditor is authorized to substitute his judgment as to the necessity or propriety of the appointment for that of the commission. We do not agree with the defendant that the services required could have been performed only by an attorney, and the fact that Mr. Pew is an attorney does not change the character of the work.

It is not questioned that the services rendered were necessary nor that they were of the reasonable value set upon them,

and there is not any excuse for the refusal of the auditor to perform the plain duty devolved upon him by virtue of his office.

The motion to quash is overruled, and the peremptory writ will issue forthwith.

ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

STATE EX REL. PIGOTT, RELATOR, v. PORTER, STATE AUDITOR, RESPONDENT.

(No. 4,593.)

(Submitted April 8, 1920. Decided April 19, 1920.)

[189 Pac. 619.]

(For syllabus, see *State ex rel. Pew* v. *Porter, ante,* p. 535.)

Mr. Jas. A. Walsh, for Relator.

Mr. S. C. Ford, Attorney General, and *Mr. Frank Woody,* Assistant Attorney General, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The state efficiency and trade commission employed William T. Pigott to prepare the proposed legislative bills deemed necessary to carry out the recommendations of the commission. In all other respects the facts involved herein are identical with the facts presented in *State ex rel. Pew* v. *Porter, ante,* p. 535, 189 Pac. 618. Upon the authority of that case the motion to quash is overruled, and the peremptory writ is directed to issue forthwith.

ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

STATE, RESPONDENT, *v.* VANDERVOORT, APPELLANT.

(No. 4,452.)

(Submitted April 9, 1920. Decided April 26, 1920.)

[189 Pac. 764.]

Criminal Law — Homicide — Evidence — Sufficiency — Eye-witnesses.

Homicide—Evidence—Sufficiency.

1. Evidence *held* sufficient to warrant a verdict of murder in the second degree, it showing that defendant, accompanied by his brother, went to the home of deceased, with whom they had a quarrel and against whom defendant had made threats that he would "get" or "fix" him, and killed him.

Same—Eye-witness—When State not Obliged to Call.

2. In a prosecution for homicide, where the only eye-witness was a brother of the defendant, and an accomplice though not jointly charged, whose name had been indorsed on the information, refusal to grant a motion to require the state to place such witness upon the stand, *held* not error, the court being advised by the county attorney that, if called, the witness would by false swearing and the concealment of material facts injure the state's case.

Appeal from District Court, Fallon County, in the Sixteenth Judicial District; B. B. Law, Judge of the Ninth District presiding.

WALTER VANDERVOORT was convicted of murder in the second degree, and from the judgment and an order denying his motion for a new trial he appeals. Affirmed.

Messrs. Loud & Leavitt and *Mr. Joseph Hodgson*, for Appellant, submitted a brief; *Mr. C. H. Loud* argued the cause orally.

Mr. S. C. Ford, Attorney General, and *Mr. Otto A. Gerth*, Assistant Attorney General, for Respondent, submitted a brief; *Mr. Gerth* argued the cause orally.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

Appellant was convicted, in Fallon county, of the crime of murder in the second degree. He appeals from the judgment

imposed and from the court's order denying his motion for a new trial.

In the year 1917 appellant was jointly interested with his [1] brother, Worden Vandervoort, in ranching operations near Westmore; he contracted with one George Davis to put up certain hay, owned by appellant alone, for which service Davis was to receive one-third of the hay in the stack. Appellant, in the absence of Davis, hauled what he claimed to be his two-thirds; Davis claimed that a considerable portion of his hay had been taken, and, after making a demand on appellant, placed the matter in the hands of Charles J. Dousman, then county attorney of Fallon county, who wrote appellant concerning the matter. It appears from the evidence that the brothers took offense at this action. Prior to that time the three had been on good terms, and Davis had purchased a wagon and mower from Worden Vandervoort for the sum of $80, but had not paid the purchase price.

On the trial four witnesses testified to threats made by appellant against Davis, to the effect that he would "get" or "fix" Davis, each threat being accompanied by vile epithets, and, according to witnesses for the state, on the morning of December 5, Worden Vandervoort told his brother, this appellant, that, "after you get back from getting some coal and I get back from Wilson's we will go and settle with 'Slim,'" Slim being a nickname for Davis. On that date the brothers did go to the Shaw ranch, where Davis was living alone, but when they arrived a man by the name of Pitson was with Davis, and, though Davis invited them to stay to dinner, they remained but a few moments and went to the Arnsworthy ranch, a half mile distant, from which the Shaw house could be readily seen. Here they took dinner with Arnsworthy, who noticed that Walter Vandervoort was armed with a 38-caliber revolver, and who, on request, was permitted to examine it, and noted that it contained six cartridges. The brothers discussed certain business matters with Arnsworthy and watched the Shaw house from the window; they noted the departure of Pitson,

and shortly thereafter returned to the Shaw ranch. What transpired there could only be learned from the two Vandervoort brothers, and was developed at the trial by the state from various statements made by them.

Appellant appeared at A. C. Long's store, and telephoned for a doctor, and on being questioned said he had shot Davis, and, according to Long, told about where Davis was shot, on the ranch, outside the house, and in answer to the question as to how badly he was hurt stated that he was able to walk to the house. Later appellant gave himself up to the sheriff, stating, "I shot George Davis," and gave the sheriff the revolver, which then contained five unexploded cartridges and one empty shell. Davis had been shot in the breast, the ball passing through his body, and died that night. The doctor testified that his death was caused by the gunshot wound.

Worden Vandervoort related his version of the affair to the doctor in the presence of Davis, and while Davis was still conscious, and the only remark made by Davis was, "Tell the rest of it," or "Tell it all," whereupon the doctor advised him to keep quiet. Worden's story is that the trip was made primarily to see Arnsworthy; that they stopped at the Shaw ranch, and were told by Davis that Arnsworthy had that morning told him that he (Arnsworthy) was going to a neighbor's shortly, and that their hurried departure was for the purpose of seeing Arnsworthy before he left his ranch. As to this, Pitson denied that Davis had made such a statement, and Arnsworthy testified that he had told Davis nothing of the kind. According to Worden Vandervoort, on returning to the Shaw ranch, he knocked and was invited to enter; that they went in and had some conversation with Davis, and he then showed him the Dousman letter, and asked what it meant; that Davis said they had taken or stolen enough of his hay to settle the other account, and thereupon arose and attempted to strike Worden, who caught him about the neck and got hold of his thumb. Davis was much smaller than, and not a match physically for, either of the Vandervoort brothers. It seems he had a sore

thumb and, when seized by Worden, cried out in pain and promised, if released, to "settle like a man," whereupon he was released. On being released, according to Worden's story, Davis asked to be excused, went first to the barn and got his horse and then to the granary and secured a gun, and, coming toward the house, ordered the brothers to come out, using a vile epithet. On their refusal, he fired a charge of shot through the door at about the height of a man's head, the charge striking the opposite wall. Shortly after he entered the kitchen with the gun held in position to fire. The brothers had retreated to an adjoining room and stood behind a post. As Davis advanced, Walter Vandervoort, who stood behind Worden, fired, and Davis fell.

The state's witnesses testified to the shot having been fired through the door, and that the shotgun was in the room with an exploded shell in the right barrel and a loaded shell in the left, but that the gun had been broken and out of order for some time and the left barrel could not be discharged. Two loaded shells were found on the kitchen floor.

The prosecution having announced that it was about to rest its case, the defense demanded that the prosecution be required to call Worden Vandervoort, he being the only eye-witness to the transaction and his name being indorsed on the information as a witness for the state. Thereupon the county attorney offered to make an affidavit setting forth his reasons for not so doing, but was advised by the court that his statement would be sufficient, and he then stated as his reasons that, to the best of his knowledge, the statement of Worden Vandervoort would not be correct and truthful; that many facts were in his possession which induced him to believe that the witness was biased, and that the demands of justice dictated that, if the witness be examined at all, the state should have the opportunity to cross-examine him at length, and should not be deprived of the right of impeachment. On this showing the court denied the motion and the state closed its case.

Worden Vandervoort was called as a witness for the defense, and told substantially the same story as he had related to the doctor and at the inquest. On rebuttal, the state called three witnesses, who testified to a conversation in which Worden stated, some time prior to the killing, that he was going "fifty-fifty" with Walter, and that if Davis licked one he would have to lick both, one witness who testified that Worden had stated to him that, "If Davis does not settle with me, I'll get him," and one who testified that the day before the killing Worden said that he was going up to settle with Davis, and that he was not going unarmed.

Arnsworthy, recalled, testified that after the shooting, Worden came to his ranch and told him of it, and stated, "I am proud of the —— —— —— where he lays."

But two assignments of error are made:

(1) Denying the defendant's motion to direct the county attorney to place Worden Vandervoort on the stand, he being the only eye-witness to the shooting.

(2) Insufficiency of the evidence to prove beyond a reasonable doubt (a) that defendant is guilty of the crime of murder as charged in the information, or of any other crime embraced therein, or (b) that defendant is guilty of murder in the second degree.

1. Under the old English common law, the prosecution was [2] compelled to place all eye-witnesses on the stand. Originally the rule applied in all felony cases, but was later restricted to homicide cases. (1 Chitty Crim. Law, 624.) "Under the rigorous and harsh rules of the old common law, there was reason for compelling the prosecution to call and examine as witnesses all persons who had knowledge of material facts connected with the crime charged against an accused person. That law denied him counsel, and sealed his lips as a witness." (*Keller* v. *State*, 123 Ind. 110, 18 Am. St. Rep. 318, 23 N. E. 1138.) "The prisoner was not permitted to call witnesses, although present, and the issue of his guilt or innocence was determined upon the evidence offered in support of the prose-

cution. Subsequently, when he was permitted to have witnesses, they did not obtain any particular credit by reason of the fact that they were not sworn, and the practice continued; but later, when the prisoner's witnesses were permitted to testify on oath and he was permitted to call on his own behalf all eye-witnesses of the crime, the reason for the ancient rule ceased." (1 Chitty Crim. Law, 624, 625.) "Under the later and present practice, however, the prosecution need not examine all its witnesses, but the choice, introduction and examination of the state's witnesses usually rests in the discretion of the prosecuting attorney." (16 Corpus Juris, 845, and note.) And in this state the statute specifically so declares: "Upon a trial for murder or manslaughter it is not necessary for the state to call as witnesses all persons who are shown to have been present at the homicide, but the court may require all of such witnesses to be sworn and examined." (Sec. 9283, Rev. Codes.)

The wording of the statute is such, however, that, while it may not be necessary to call *all* witnesses, the state is not excused from calling at least one witness, or the only witness to a homicide, unless there is an exception to the general rule laid down in the case of *State* v. *Metcalf*, 17 Mont. 417, 43 Pac. 182.

Questions concerning the calling of "all witnesses" have been raised in this state in a number of cases, although the question here involved has not been before the court. The case of *Territory* v. *Hanna*, 5 Mont. 248, 5 Pac. 252, was decided before the passage of the statute referred to. There, the county attorney, having stated that the wife of deceased was present in an adjoining room when the homicide was committed; the court said: "The prosecuting attorney ought to have called this witness, or made some satisfactory explanation to the court why he did not, otherwise a suggestion is raised that there was design and purpose in omitting to call the witness. Especially should she have been called, as there was no proof

of the circumstances attending the killing in evidence at the time the motion was made."

In the case of *State* v. *Rolla,* 21 Mont. 582, 55 Pac. 523, the court, commenting on the *Hanna Case,* said: "If the prosecuting attorney in the case quoted from had made some satisfactory explanation of his refusal to place the eye-witness on the stand, it might have altered the case very materially."

In the case of *State* v. *Tighe,* 27 Mont. 327, 71 Pac. 3, the court said: "It is discretionary with the trial court whether all persons who are shown to have been present at a homicide shall be sworn and examined in behalf of the state. Exercise of its discretion will be corrected only in case of abuse" (citing *State* v. *Rolla, supra*). And a like ruling was made in *State* v. *Inich,* 55 Mont. 1, 173 Pac. 230.

The case relied upon by counsel for the appellant, however, is that of *State* v. *Metcalf,* above, where the demand was made that the state call and examine the only person shown to have been present at the homicide, and available at the trial. The county attorney stated that this witness was too drunk at the time to have seen anything that occurred, and the trial court denied the motion. This court held that the reason given was not sufficient to warrant the refusal, but that the witness should have been placed on the stand and examined, that the jury might determine the fact. The court quoted from the opinion in *Wellar* v. *People,* 30 Mich. 16, as follows: "In cases of homicide, and in others where analogous reasons exist, those witnesses who were present at the transaction, or who can give direct evidence on any material branch of it, should always be called, unless possibly, where too numerous"—and then said: "We think, under the great weight of authority, that resort should not be had to circumstantial evidence in such cases where it appears that direct proof can be reasonably had." This is a salutary rule for the safeguarding of the rights, the life and the liberty of the accused, and should be adhered to in all cases where "direct proof can be reasonably had." However, to every rule there are exceptions, which are

as necessary of observance as are the rules themselves, and should be invoked whenever justice and public safety and the protection of the interests of society require it. And "when the reason of a rule ceases, so should the rule itself." (Rev. Codes, sec. 6178.)

The reason for the rule in the *Metcalf Case* is that all of the facts be brought to the attention of the jury so that full justice might be done; that the innocent be protected; but the rule was never intended as a shield against the eliciting of all of the facts and circumstances. Here, the witness was produced in the courtroom; the defense could and did make him its own witness, and get before the jury all the facts within his knowledge. The state had laid before the jury all the facts it could have proven by the witness, and the only result of granting the motion would have been to require the state to vouch for the witness and to exclude from consideration by the jury those damaging statements by the witness elicited on rebuttal.

The theory of the prosecution was, throughout the trial, that the evidence tended to show a conspiracy between the Vandervoort brothers to do away with the deceased, and the consummation of that conspiracy. The county attorney did not believe, from the facts in his possession, that "direct proof could be reasonably had" from this sole eye-witness, but that, on the contrary, he would pervert the facts to establish the innocence of the accused—that the witness was in fact an accomplice of the defendant on trial, and the evidence tended to show that this belief was well founded. It would seem a perversion of justice to require the prosecution, under such circumstances, to place the witness on the stand and vouch for him, and the weight of authority is against such a requirement.

In the case of *State* v. *Barrett*, 33 Or. 194, 54 Pac. 807, the court, after stating the English rule, says: "And in this country it is the rule, in Michigan and Montana, that the prosecuting officer is bound to show the *res gestae*, or entire transaction, by calling all the obtainable witnesses present at the time, unless

it appears that the testimony of those not called would be merely cumulative [citing Michigan cases and *State* v. *Metcalf, supra*]. But this doctrine is denied and repudiated, and we think rightfully, by a great majority of the courts in which the question has come up for adjudication. [Citing a large number of authorities.] It probably came into use in England at a time when the right of a defendant in a criminal case to be represented by counsel, or to have witnesses appear and testify in his behalf, was either denied entirely, or very much abridged. Under such circumstances, it was, of course, important that the prosecution be compelled to prove the entire transaction, and to call all the witnesses present at the time, whether they would testify for or against the defendant. But these restrictions upon the rights of a defendant do not, and never did, exist in this country. * * * In addition to this, the state is bound to make out its case beyond a reasonable doubt; and, if the prosecuting officer does not call sufficient witnesses for that purpose, or if any unfavorable inference can be drawn from his failure to call any witness, the defendant is not likely to suffer by the omission. And if he calls only such witnesses as are favorable to the state, the defendant has a right to call any others which he may suppose will relate the facts favorable to him. It does not seem to us, therefore, that the state should be compelled to call and vouch for a witness, even though it be evident that he knows all about the facts, when the prosecuting officer, acting in good faith and under his official oath, is of the opinion that he will, by false swearing, or by the concealment of material facts, attempt to establish the innocence of the accused."

In the case of *Ross* v. *State*, 8 Wyo. 351, 57 Pac. 924, the court, following the Oregon court, said: "The courts of Michigan and Montana adhere to the former English rule, except when the witnesses are too numerous * * * [citing several Michigan cases and the case of *State* v. *Metcalf, supra*]. In the great majority of the states where the question has been passed upon, however, the decisions are the other way [citing

cases].'' The court thereupon followed the latter rule. It then remarks: "As the state does not desire the conviction of any innocent person, we have no doubt of the power of the court, and it might become its duty, in case of any attempt of the prosecuting officer to prejudice the defendant by the suppression of testimony, to call, or require the prosecutor to call, the witnesses. But no such condition exists in this case."

In 12 Cyc. 550, we find the declaration that "even where the practice is to require the prosecution to produce all the witnesses, the state cannot be required to call the accomplice of the defendant as a witness."

The foregoing cases, we believe, place too narrow a construction on the *Metcalf Case,* which, we apprehend, goes no further than to lay down the general rule that the case should not be made by circumstantial evidence in homicide cases "where direct proof can be reasonably had." If the evidence tends to show that the witness will, by false swearing or by concealment of facts, seek to establish the innocence of the accused, it cannot be said that "direct proof can be reasonably had" from such a witness, and it is here we believe an exception to the general rule heretofore laid down should be had.

Thus, in *Goode* v. *State,* 57 Tex. Cr. 220, 123 S. W. 597, where the facts are singularly similar to those in the case at bar, the state made its case by circumstantial evidence and the statements and alleged confessions of the defendant, who told of the killing and of the presence of one Joe Dorsey. Dorsey was under arrest and in jail; the demand was made that the state place him on the stand. In passing on the court's refusal to grant the demand, the Texas court said: "This motion alleges that Dorsey was an eye-witness to the killing, and the testimony of the state indicated clearly that he was a party to the criminal conspiracy to kill deceased. The motion itself showed he was in jail, and it would indeed have been a singular rule to require the state to place upon the witness-stand a co-conspirator to be bound by his testimony."

In the case of *People* v. *Rush*, 107 Mich. 251, 65 N. W. 99, the court employed the following language in disposing of this question: "The first alleged error is that the court did not require the people to produce a witness whose name was indorsed upon the information. There are two complete answers to this: (1) The witness was in court, and was called as a witness by the respondent, who had the benefit of his testimony. (2) His name was placed upon the information at the request of the respondent. The testimony of the people disclosed that another man was with the respondent at the time of the assault. The contention is that this witness was that man; that he was an eye-witness to the transaction; and that it was therefore the duty of the prosecutor to call him, under the following decisions: [citing Michigan cases]. The assault was premeditated; was made in the night, with some blunt instrument; and, as soon as the cowardly blow was struck, the respondent and his companion ran away, and escaped in the darkness. The above decisions do not hold, nor is there any reason or common sense in holding, that the people should call as a witness an accomplice in crime." True, this last case was not a homicide case, but one for assault with a deadly weapon; but the court made no distinction, and the cases referred to were largely homicide cases. The closing statement of the quotation voices the sentiment of the writer on this subject.

Here we have under consideration a case where there were but two men present at the time of the shooting, the man charged with the crime and his brother, who might well have been placed on trial with him. On the trial the state made a complete case from circumstantial evidence, including the statement of both of these men as to what took place at the time of the shooting; the state could not hope to elicit any fact from the witness Worden Vandervoort that would aid the state, but, had he been placed on the stand, would have vouched for him, and have been precluded from impeaching him or showing motive on his part, and would only have aided the defendant in the action to prove matters claimed to be the facts by the Van-

dervoort brothers, tending to show justification; the witness was produced in court, and the defendant placed him on the stand and had the advantage of his testimony. Under such circumstances, we are of the opinion that, to the general rule laid down in the *Metcalf Case*, there is the exception that, where the evidence reasonably tends to show that the proposed witness was an accomplice in crime, whether charged jointly or not, and that, if called, he would by false swearing or the concealment of material facts, injure the state's case, and such a showing is made to the satisfaction of the court, the state is not bound to call such a witness; though the prosecution should have him present and available to the defense, that they be not misled by the fact that the name of such witness was indorsed on the information. We find no error in the court's refusal to grant the motion.

2. The second assignment of error is that the evidence is insufficient to justify a verdict of murder in the second degree, or any verdict against appellant. The evidence has been sufficiently canvassed to disclose the facts, which are ample, if believed by the jury, to justify the verdict rendered.

The judgment and order denying a new trial are affirmed.

Affirmed.

ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

REEVE, APPELLANT, v. CITY OF BILLINGS ET AL., RESPONDENTS.

(No. 4,565.)

(Submitted April 9, 1920. Decided April 27, 1920.)

[189 Pac. 768.]

Cities and Towns — Special Improvements — Limit of Cost — Statutes and Statutory Construction.

Cities and Towns—Special Improvements—Limit of Cost Per Lineal Foot —Inapplicability of Statute.

1. *Held*, that the limitation of $1.50 per lineal foot placed upon municipal improvements by section 2, Chapter 89, Laws of 1913, or Chapter 175, Laws of 1919, as amended by Chapter 142, Laws of 1915, has no application to street grading, draining, paving or curbing and gutter work.

Statutory Construction—Intent of Legislature.

2. Statutes should be given an interpretation best calculated to carry out the intent of the legislature in enacting them.

Appeal from District Court, Yellowstone County; Charles A. Taylor, Judge.

SUIT by E. E. Reeve to restrain the City of Billings and others from levying the cost of special improvements against his property. Judgment for defendants, and plaintiff appeals. Affirmed.

Cause submitted on briefs of Counsel.

Messrs. Waldo & Cunningham, for Appellant.

Messrs. Johnson & Coleman, for Respondents.

MR. JUSTICE COOPER delivered the opinion of the court.

By his complaint in the court below the appellant sought to restrain the city of Billings, its mayor and other officers, from levying the cost of the improvements constructed in Improvement District 168 in excess of $1.50 per lineal foot, plus the cost of curb and gutters against his property situated within that district. He alleges that all the steps required by law to put the work in motion were followed by the respondent

city, including the making of a contract and the giving of a bond under the provisions of Chapter 89 of the Acts of the Thirteenth Legislative Assembly, as amended by Chapter 175 of the Sixteenth Legislative Assembly. He specifically alleges that the resolution of intention and the notices provided for the construction of concrete curbs and concrete gutters along the streets and avenues, and the grading and draining of the streets and avenues within the district; that neither the resolution of intention nor the notice published and mailed indicated that within said special improvement district any waterworks, water-mains or extensions of water-mains were to be constructed; that the contract did not provide that such waterworks, water-mains, or extension of water-mains, should be constructed, and that none were constructed within said district; that the cost of the improvements so constructed exceeded the sum of $107,000; that the whole cost for grading, draining and paving would amount approximately to $9 per lineal foot, and in addition forty cents per square foot for gutters, and sixty-five cents per lineal foot for the curb,—a total in excess of $10 per lineal foot for all the different kinds of work done within said district; that unless restrained, defendants will, in default in the payment of the taxes or assessment so levied, proceed to advertise and sell his property for the payment of delinquent taxes; that he has no plain, speedy and adequate remedy at law, and that irreparable damage will be done him unless the defendants are restrained from levying and assessing the cost thereof against the property of plaintiff and defraying the cost of such improvements. To this complaint a general demurrer interposed to the complaint in the court below was sustained. Upon appellant's refusal to amend, the court rendered a judgment of dismissal. The appeal is from the judgment.

By Chapter 175, Laws of 1919, sections 3413–3417, Revised Codes, providing for the creation of a special improvement district for the construction or acquisition of a system of waterworks, and the collection of special assessments to pay for the

same, are repealed. The Act then provides that whenever the public interest or convenience may require, the city council is authorized to create special improvement districts and order the construction of improvements in the streets of cities, including waterworks, water-mains and extensions of water-mains. Section 2 of Chapter 89 as amended by Chapter 142, Laws of 1915, is amended only by the insertion in the second section of that Act of the words "waterworks, water-mains, and extension of water-mains," and the addition at the end of section 2, as it then stood, of the following: "Provided, however, that the whole cost so assessed shall at no time exceed the sum of $1.50 per lineal foot plus the cost of the pipe so laid of the entire length of the water-mains laid in such district."

The sections of the Revised Codes repealed by the later Act made provision for the construction of municipal waterworks; the creation of districts for that purpose; for the issuance of warrants, and specified the mode in which the levy and collection of special assessments should be carried out.

Appellant in his brief contends that the words in section 2 [1] of Chapter 175, "whole cost so assessed," must be read in connection with those sections of Chapter 89, as amended, having to do with assessments, and that it was the legislative intent that municipalities should be limited in the construction of public improvements to $1.50 per lineal foot of improvements constructed, plus the cost of pipe in cases where the laying of the pipe within the district was part of the contemplated improvement. Respondents contended in the court below that it was intended to limit a municipality in the construction of improvements only when the improvement constructed was "waterworks, water-mains and extension of water-mains." We are of opinion that whatever may have been the intention of the legislature in the use of the words "waterworks, water-mains and extension of water-mains," and the "limitation of the cost to $1.50 per lineal foot, plus the cost of the pipe laid," it was not that the municipal bodies of the state should be limited to the expenditure of $1.50 per lineal foot for the "grading,

draining and paving, and curb and gutter work," which the plaintiff alleges could not be installed for less than $10 per lineal [2] foot. The Act in question should be given an interpretation best calculated to carry out the actuating thought in the minds of the legislature at the time of its passage. (*State ex rel. Knight* v. *Cave*, 20 Mont. 468, 52 Pac. 200.) The interpretation for which appellant contends would work the defeat of the purpose manifestly intended in the passage of Chapter 175 (Sixteenth Session), and the Acts of which it is amendatory.

The judgment is affirmed.

Affirmed.

ASSOCIATE JUSTICES HOLLOWAY, HURLY and MATTHEWS concur.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

McCAULL-DINSMORE CO., APPELLANT, *v.* JACKSON, RESPONDENT.

(No. 4,112.)

(Submitted April 10, 1920. Decided May 3, 1920.)

[189 Pac. 771.]

Sales—Contracts—Breach—Nonperformance by Buyer—Rights of Seller—Rescission—Notice.

Contracts—Sales—Breach by Buyer—Rights of Seller.

1. Where one party to a contract communicates to the other his refusal to be longer bound thereby, the latter is excused from further performance on his part.

Same.

2. *Held*, that where a wheat buyer, under a contract which provided that upon delivery of the wheat to the railway company a bill of lading should be issued to the seller, who was to attach a sight draft payable at Duluth, Iowa, unqualifiedly advised the seller after referring to a threatened railroad strike, that four days thereafter it would cease honoring drafts accompanying bills of lading containing a

loss and damage exemption clause, and the seller upon inquiry was informed that no bill of lading would be issued without such clause, he was justified in treating the contract as repudiated and in reselling the wheat.

Same—Breach by Buyer—Election of Seller to Consider Contract at End—Notice.

3. Where plaintiff, in an action for breach of contract of sale, himself repudiated in advance a material provision thereof, defendant was under no obligation to give notice of his intention to consider the agreement at an end and resell.

Appeal from District Court, Madison County; Wm. A. Clark, Judge.

ACTION by the McCaull-Dinsmore Company, a corporation, against P. V. Jackson. From a judgment for defendant, plaintiff appeals. Affirmed.

Messrs. Day & Mapes, for Appellant, submitted a brief; *Mr. E. C. Day* argued the cause orally.

Did the defendant have the right to abandon or rescind the contract for the delivery of the wheat in controversy upon the receipt of the circular letter offered in evidence? The refusal on the part of the obligor that will excuse the obligee from complying with the terms of his contract must be a distinct and unqualified refusal to be further bound by the contract. (*Fay* v. *Oliver*, 20 Vt. 118, 49 Am. Dec. 764; *Way* v. *Johnson*, 5 S. D. 237, 58 N. W. 552; *Lake Shore & M. S. Ry. Co.* v. *Richards*, 152 Ill. 59, 30 L. R. A. 33, 38 N. E. 773; *Gerli* v. *Poidebard S. Mfg. Co.*, 57 N. J. L. 432, 51 Am. St. Rep. 612, 30 L. R. A. 61, 31 Atl. 401.) The principle to be applied in all of these cases is whether or not the nonperformance or statement of intention amounts to an abandonment of the contract or a refusal to perform. (*West* v. *Bechtel*, 125 Mich. 144, 51 L. R. A. 791, 84 N. W. 69; *Brady* v. *Oliver*, 125 Tenn. 595, Ann. Cas. 1913C, 376, 41 L. R. A. (n. s.) 60, 147 S. W. 1135.)

One party cannot make a valid cancellation of a contract of sale and thus escape performance. A mere assertion of inability to carry on a contract of sale is no notice of repudiation, nor does a mere threat to abandon a contract, constitute a

breach. (*Lonsdale Grain Co.* v. *Canton Milling Co.*, 195 Mo. App. 452, 193 S. W. 853.) A party having a right to rescind a contract of sale, and who elects to do so, must give notice to the seller. The notice for the rescission must be clear and unambiguous and convey an unmistakable purpose to insist on the rescission. (*Wright* v. *Bristol Patent L. Co.*, 257 Pa. St. 552, 101 Atl. 844.) If anything is said or done by the buyer to induce the seller to believe that he had waived the failure to make payment according to the terms of the original contract, he cannot afterward, when the conditions have been changed, claim a breach by reason of such noncompliance. (*Wallingford* v. *Bushton Grain & Supply Co.*, 100 Kan. 207, 164 Pac. 275.)

Mr. M. M. Duncan, for Respondent, submitted a brief and argued the cause orally.

The appellant argues in its brief that the respondent was compelled to notify the appellant immediately on the receipt of its letter of repudiation that he rescinded the contract. This argument is without merit. The suit was brought by appellant for damages and for breach of contract. The respondent defends the action on the ground of its breach by appellant, which breach was of a condition precedent to any act to be performed thereunder by him. A party who fails to perform according to the terms of his contract cannot maintain an action on the contract. (*Dermott* v. *Jones*, 64 U. S. (23 How.) 220, 16 L. Ed. 442 [see, also, Rose's U. S. Notes].)

In this character of actions where the contract has been repudiated or abandoned, or where notice of rescission would be futile, no notice of rescission is required to be given. (*Town* v. *Jepson*, 133 Mich. 673, 95 N. W. 742; *Triplett* v. *Rugby Distilling Co.*, 66 Ark. 219, 49 S. W. 975; 35 Cyc. 154 (9).) As to executory contracts, such as this, the rule is that where a party repudiates in advance his obligations thereunder, and refuses to be longer bound thereby, communicating such repudiation to the other party, the latter party is excused from

further performance or tender thereof. (6 R. C. L. 1012; *Bogardus* v. *New York Life Ins. Co.*, 101 N. Y. 328, 335, 4 N. E. 522; *Ward* v. *Kadel*, 38 Ark. 174; *Mansfield* v. *New York etc. R. R. Co.*, 102 N. Y. 205, 6 N. E. 386; *McCormick* v. *Tappendorf*, 51 Wash. 312, 99 Pac. 2.)

It is self-evident that the appellant is seeking in this action to take advantage of the nonperformance of that which it prevented. This is not allowable. (*McDonald* v. *Mountain Lake Water Co.*, 4 Cal. 335; *Beach* v. *Covillard*, 4 Cal. 315.)

In the case at bar, had the strike gone into effect, or had the price of wheat fallen below the contract price, after the receipt of the letter of repudiation the remedy of the respondent would have been an action for damages against appellant. (*Davis* v. *Bronson*, 2 N. D. 300, 33 Am. St. Rep. 783, 16 L. R. A. 655, 50 N. W. 836; *Chicago Bldg. etc. Co.* v. *Barry* (Tenn.), 52 S. W. 451.)

The rule seems to be well settled that when the buyer countermands his order for goods under an executory contract before the goods are delivered, it is notice to the other party that he elects to rescind his contract, and submit to the legal measure of damages resulting from the breach. (*Heiser* v. *Mears*, 120 N. C. 443, 27 S. E. 117.)

There is some claim by appellant in its brief that respondent did not act promptly. The law is that the wrongdoer cannot make extreme vigilance and promptitude conditions of rescission. It does not lie in his mouth to complain of delay. (*Pence* v. *Langdon*, 99 U. S. 578, 25 L. Ed. 420 [see, also, Rose's U. S. Notes].)

Some suggestion has been made by appellant that it was the duty of the respondent to hold himself in readiness to perform the contract, notwithstanding the letter of repudiation, for the full period of forty days. After there has been a breach of contract by a party there is no liability on the part of the other party to it to hold himself in a position to perform the contract. (*Brazell* v. *Cohn*, 32 Mont. 556, 81 Pac. 339; note to

Davis v. *Bronson* (N. D.), 33 Am. St. Rep. 783; *Zuck* v. *Henry McClure & Co.*, 98 Pa. St. 541.)

Appellant's letter was a repudiation of the contract. (*Wester* v. *Casein Co.*, 206 N. Y. 506, Ann. Cas. 1914B, 377, 100 N. E. 488.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to recover damages for an alleged breach of contract. The defendant prevailed in the lower court, and plaintiff appealed from the judgment dismissing his complaint.

The facts of the case are not in dispute. On August 4, 1916, plaintiff and defendant entered into a contract by the terms of which plaintiff agreed to purchase from defendant, and defendant agreed to sell and deliver to plaintiff, 3,000 bushels of wheat at $1.16 per bushel, payable on delivery on board the cars at Norris, Montana, delivery to be made within forty days from the date of contract, and the grain to be shipped to plaintiff at Duluth. It was further understood between the parties, as a part of their agreement, that upon delivery the railway company would issue its bills of lading and deliver them to defendant, who should attach to them a sight draft on plaintiff, and forward them through his bank and its correspondents to Duluth, where the draft would be paid upon presentation.

The only form of bill of lading issued by the railway company contained a "loss and damage exemption clause," and this fact was known to the parties, and the contract was made with reference to it. On August 31, 1916, plaintiff sent to defendant the following letter:

"Helena, Mont., August 31, 1916.

"To Our Friends:

"Business houses the country over are preparing for conditions that will be forced upon them when the threatened railroad strike goes into effect, Monday next, September 4th. In

order to protect ourselves, from this date on we will accept drafts attached to bills of lading with delay in transit clause only. We will not honor drafts attached to bills of lading that have loss and damage exemption clause in them.

"Yours very truly,

"THE McCAULL-DINSMORE CO."

This letter was received by the defendant about September 4 or 5, after the strike order had been revoked, and the danger of the strike of the railway employees averted. Upon receipt of the letter, defendant made inquiry to ascertain whether a bill of lading without the loss and damage exemption clause would be issued, and, having determined that it would not be, he waited for several days, and then sold the wheat to another buyer at an advanced price, and notified plaintiff that he would not make delivery to it.

Two questions only are presented by the appeal: (1) Did the buyer's act in sending to the seller the letter of August 31 warrant the latter treating the contract as at an end? and (2) if a termination of the contract was admissible, could it be effected without first giving notice to the buyer?

While transactions of this character are sometimes treated [1] by the authorities under the heading "Rescission by Mutual Consent," the terms are somewhat confusing, since the element of "mutual consent" is wanting. Rather they should be considered from the standpoint of a repudiation by one party of the contract in whole or in part, which excuses the other party from performance or tender of performance. However, regardless of the designation, the rule of law which governs the transactions is well settled, and is stated succinctly in 6 R. C. L. 1012, as follows: "Where one party repudiates in advance his obligations under the contract and refuses to be longer bound thereby, communicating such repudiation to the other party, the latter party is excused from further performance on his part." The same principle is announced in 35 Cyc. 249, as follows: "The failure of the seller to perform is excused when performance is prevented by the acts and conduct

of the buyer, as, for example, by acts or conduct preventing the seller from obtaining the goods to fulfill his contract, by acts and conduct indicating an intent to abandon the contract and refuse performance thereof, or by the failure of the buyer to perform conditions imposed on him by the contract." (*Slauson* v. *Albany R. Co.*, 60 N. Y. 606; *McCargar* v. *Langlois*, 81 Vt. 223, 69 Atl. 739; *Eastern Forge Co.* v. *Corbin*, 182 Mass. 590, 66 N. E. 419; *O'Neill* v. *Supreme Council A. L. of H.*, 70 N. J. L. 410, 1 Ann. Cas. 422, 57 Atl. 463; *Providence Coal Co.* v. *Coxe Bros. & Co.*, 19 R. I. 380, 582, 35 Atl. 210; *McCormick* v. *Tappendorf*, 51 Wash. 312, 99 Pac. 2.)

Counsel for appellant find no fault with the rule, but insist [2] that the facts do not bring this case within it; that the letter of August 31 was not a repudiation of any material provision of the contract, but only a warning notice to become effective in the event that the then impending strike materialized, and since it did not materialize, and the strike order was annulled before defendant received the letter, he was not justified in refusing to deliver the grain. To this contention the answer may be interposed that the reservation contained in the letter was not made contingent upon the strike going into effect and was not limited to the duration of the strike. The letter states distinctly that "from this date on * * * we will not honor drafts attached to bills of lading that have loss and damage exemption clause in them." It is true the letter refers to the threatened strike; but, if it was the intention of plaintiff to limit the operation of the notice to the duration of the strike, appropriate language to express that intention might have been employed, or, if it was the purpose to have the notice effective only in the event that the strike materialized, in all fairness it would seem that the duty to recall the letter within a reasonable time after the strike order was annulled rested upon the plaintiff, the party who injected the element of uncertainty into the transaction. Under the circumstances, the defendant was left to place upon the letter the interpretation which the language fairly war-

ranted, and in reaching the conclusion that it expressed a determination no longer to be bound by the provision for the payment of the draft we think the defendant was fully justified. It cannot be said that the provision of the contract thus affected was not a material one. Under it the defendant was assured that the grain would not be delivered to the plaintiff at Duluth until the draft was paid, and in this arrangement defendant found his only security for the purchase price of his grain. If he had shipped the grain under the conditions imposed by the letter of August 31, he would have been compelled to wait until the grain was delivered in Duluth before he received the whole or any part of the purchase price, and even then would have been without security, other than the personal liability of the plaintiff.

If this was a case of technical rescission, it is doubtless [3] true that the obligation would rest upon the defendant to notify the plaintiff before he put it out of his power to comply with the contract; but if the act of the plaintiff amounted to a repudiation of a material provision of the contract, and we think it did, then there was no duty imposed upon the defendant to give notice, and notice, if given, would have been without effect. (*Wood, Curtis & Co.* v. *Seurich*, 5 Cal. App. 252, 90 Pac. 51.)

We find no error in the record. The judgment is affirmed.

Affirmed.

ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

STATE, RESPONDENT, *v.* SMITH, APPELLANT.

(No. 4,487.)

(Submitted April 16, 1920. Decided May 3, 1920.)

[190 Pac. 107.]

Criminal Law—Sedition—Jury—Statutes—Intent — Defenses —Offer of Proof—Instructions—Evidence—Stenographers—Cross-examination—Constitution—Free Speech—Free Press —War—Newspapers—Publication.

Jury—Purpose of *Voir Dire* Examination.

1. The purpose of the *voir dire* examination of veniremen is to enable counsel not only to determine whether there exists a state of mind on the part of any juror which will prevent him from acting impartially and without prejudice to the substantial rights of either party, but also to exercise intelligently the peremptory challenges allowed by law.

Sedition—Jury—*Voir Dire* Examination—Benefit of Doubt—Erroneous Exclusion of Proper Question.

2. In a prosecution for sedition, the defendant being charged with the publication of an article in a newspaper which was calculated to incite or inflame resistance to the state council of defense in connection with the prosecution of the war, refusal to permit a juror on his *voir dire* examination to answer the question whether, if there was a reasonable doubt in his mind as to whether or not the article was calculated to incite or inflame resistance, *etc.*, he would acquit defendant, was error, in the absence of an instruction that he could be convicted only if the jury found beyond a reasonable doubt that the statement was calculated to incite or inflame resistance to constituted authority.

Criminal Law—Assumption of Fact as Proven—Error.

3. In a criminal cause, the district court cannot take from the jury or assume as proven, any essential fact, no matter how conclusive the evidence may appear to be.

Same—*Mala Prohibita*—Intent Immaterial.

4. In a statutory crime, enacted under the police power of the state, it is not necessary to make evil intent an ingredient of the prohibited act.

Statutes—Legislative Intent Controlling.

5. The legislative intention in the enactment of a statute, if ascertainable, is controlling.

Sedition—Publication of Seditious Article—Intent.

6. *Held*, that the intent of the person deliberately writing or publishing a seditious article contrary to the provisions of Chapter 11, Extra. Session, Laws of 1918, is immaterial and not an ingredient of the crime of sedition; hence error was not committed by the trial court in sustaining objections to questions asked prospective jurors or witnesses concerning such intent.

For authorities passing on the question of intent as an element of crime, see note in 11 **L. R. A.** 807.

Same—Intent—Instructions.

7. Since intent is not an ingredient of the crime of sedition consisting of the publication of an objectionable article in a newspaper, refusal of instructions embodying the provisions of sections 8112 and 8113, Revised Codes, relative to union of act and intent and how intent may be manifested, was proper.

Same.

8. *Held*, that it was error to instruct the jury in a prosecution for publishing a seditious article, that, the state having proven that the law had been violated, guilty intent is conclusively presumed, since it included the intent to publish the article which was immaterial, and did not limit it to the intent presumed from a publication likely to incite and inflame resistance to duly constituted federal or state authority.

Criminal Law—Intent.

9. The deliberate commission of an act includes the intent to commit the act.

Same—Intent—Disputable Presumptions.

10. The presumption that an unlawful act was committed with an unlawful intent is disputable.

Sedition—Defense—Intent—Improper Refusal of Offer of Proof.

11. *Held*, that conviction for publishing a seditious article could be had only if the act was deliberately or intentionally committed, and that it was therefore error to exclude an offer of proof that defendant, as vice-president of a publishing company, did not intend to publish the article, *i. e.*, that it was published without his knowledge or against his express command, or through the negligence of an employee,—the testimony to be weighed against the disputable presumption of intent arising from the commission of the act.

Same—Officer of Corporation—Defense—Instruction—Proper Refusal.

12. An instruction that failure of defendant, vice-president of a publishing company, to prevent the publication of a seditious article, was not sufficient to render him criminally responsible, was properly refused, mere failure to act not being sufficient to exonerate him.

Instructions—Abstract Propositions.

13. The giving of an abstract proposition of law, not based upon the issues or facts supported by the evidence, is error.

Sedition—Conviction for Crime Other Than Charged—Erroneous Instruction.

14. Defendant having been charged with publishing a certain seditious article directed against the state council of defense, it was error to charge the jury that they could adjudge him guilty if they found that he uttered, wrote or printed *any* language at any time between two dates covering a period of seven months calculated to incite or inflame resistance *to any* duly constituted state authority, *etc.*, in the absence of an instruction limiting it to the particular act charged against defendant, and no evidence appearing in the record to show that he wrote or printed the article in question.

Instructions—To be Viewed as Whole.

15. Instructions must be examined in their entirety, and where as a whole they correctly state the law, and where those instructions general in their nature are by specific instructions limited to the facts in the case, error cannot be predicated on an incomplete or a too general instruction.

Criminal Law—Instructions—How to be Framed.

16. An instruction in a criminal prosecution should be so explicit and so closely connected with the facts of the case as to enable the jury to apply the law to the facts.

Same—Evidence—Stenographer Reading from Transcript—When Proper.

17. Where a stenographer is called as a witness, the better practice is to have him read from his notes, although he may be permitted to read from the transcript thereof if a sufficient foundation has been laid establishing his ability and accuracy, a liberal cross-examination being permitted in this respect.

Sedition—Evidence—Admissions—When not Admissible.

18. Testimony in which defendant admitted responsibility for publishing an article of a date different from the one charged in the information as seditious should have been stricken, in view of an erroneous instruction to the jury that the crime charged was complete if defendant had published *any* seditious language between two given dates.

Same—Witnesses—Former Conviction of Felony—Cross-examination.

19. A witness may properly be required under section 8907, Revised Codes, to answer the question, on cross-examination, if he had not been convicted of a felony.

Sedition—Free Speech—Free Press—Constitutional Guaranties.

20. The constitutional guaranty of free speech and free press was not suspended by the war, abuse of the guaranty only being punishable.

Same—Limits of Free Speech and Free Press—Power of Legislature.

21. Though the constitutional guaranty of free speech and free press was not suspended by the war, the legislature could properly by Chapter 11, Extra. Session Laws of 1918, define the limits of both by declaring that the use of language calculated to incite or inflame resistance to a duly constituted federal or state authority in connection with the prosecution of the war constituted an abuse of that liberty and a crime against the state.

Same—Place of Crime—Proof—Jurisdiction.

22. Under section 16, Article III, of the Constitution, proof of the charge in the information that defendant published the seditious article mentioned therein, in a certain county, was indispensable to give the district court of such county jurisdiction to try the cause.

Same—Language Calculated to Inflame, *etc.*—Definition.

23. *Held*, that the word "calculated" as used in the Sedition Act above, prohibiting, *inter alia*, the publishing of words "calculated to incite or inflame resistance," *etc.*, was intended to be understood to mean "likely to produce" the above effect, whether intended that it should or not.

Same—Newspaper Publication—Circulation—Evidence.

24. Evidence of the extent of the circulation of a daily newspaper was not evidence of its circulation at a date a month previous when it was a weekly.

Same—Seditious Language—Effect—Jury Question.

25. Whether alleged seditious language was or was not calculated to have the effect mentioned above (paragraph 23) was a question of fact for the jury from all the surrounding facts and circumstances, including the manner and extent of publication, as well as the inherent quality of the language used.

Same—Publication of Seditious Article—Evidence—Insufficiency.

26. *Held*, that where the only evidence of a publication of alleged seditious language calculated to incite or inflame resistance to the Montana Council of Defense consisted of the testimony of a member of the council to the effect that he as a subscriber received a copy of the paper containing the article through the mail and that he read it, it was insufficient, in the absence of further testimony that the article was made known to any person other than such member of said council, to show a publication the effect of which was likely to incite or inflame resistance to the council, or to prove the offense charged in the information.

Appeal from District Court, Lewis and Clark County; R. Lee Word, Judge.

R. B. SMITH was convicted of sedition, and appeals from the judgment and an order denying him a new trial. Reversed and remanded.

Messrs. Wheeler & Baldwin and *Messrs. Nolan & Donovan*, for Appellant, submitted a brief; *Mr. L. P. Donovan* argued the cause orally.

The information charges that the defendant did "at the county of Lewis and Clark, state of Montana * * * write and print and publish and circulate" the editorial set forth in the information. The testimony in the case showed conclusively that the article was not written and was not printed in Lewis and Clark county. We have, therefore, to consider only the question, Was it published in that county, within the meaning of the Sedition Act? We contend that it was not. The evidence does not show that the article was published in the ordinary meaning of the word. It fails entirely to show that the statements contained therein were communicated to the public by the defendant or by anyone for whose acts he is criminally responsible. The exposure of the editorial in question here to a member of the State Council of Defense was not a publication that could possibly "incite or inflame resistance" to the council of which he was a member, and, therefore, it falls entirely outside of the Act. (Chap. 11, Laws Extra. Session 1918.) And since this is the only publication proven in

the case at bar, the court should have directed a verdict of "not guilty."

The information does not allege an offense in that (a) it fails to charge that the article was written, printed or published by the defendant with intent to incite or inflame resistance. This is a necessary ingredient of the offense. (*State* v. *Kahn*, 56 Mont. 108, 182 Pac. 107.) "It must be remembered that, as hereinbefore stated, the word 'calculated,' as used in the Sedition Act, has much the same meaning as the word 'intent.'" (*State* v. *Wyman*, 56 Mont. 600, 186 Pac. 1.)

(b) The information is insufficient in that it fails to charge that the statements made in the editorial complained of were untrue or that the same was not published with good motives and with justifiable ends. The Constitution guarantees freedom of speech (section 10, Article III, Constitution of Montana), and the purpose of the constitutional provision was to make impossible prosecutions for seditious libel as the same were conducted by the government of Great Britain at or about the time of the American Revolution. (Newell on Slander and Libel, 3d ed., sec. 25; 2 May on Constitutional History of England, 2d ed., 9, note; *Abrams* v. *United States*, 250 U. S. 616, 63 L. Ed. 1173, 40 Sup. Ct. Rep. 10.) And the narrowest construction that can be given these constitutional provisions allows the individual "the right to publish, with impunity, truth with good motives and for justifiable ends, whether it respects government, magistracy or individuals." (*People* v. *Croswell*, 3 Johns. Cas. 337, 397.)

Appellant's examination of the jurors was improperly and illegally restricted. He had a right to challenge any juror "for the existence of a state of mind on the part of the juror in reference to the case or to either of the parties which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of the other party" (sec. 9261, Rev. Codes). We contend that one of the substantial rights to which appellant herein was entitled was that the state should be required to prove every element of the alleged

offense beyond a reasonable doubt, and that, if the juror's state of mind was such that he would not require proof of some of these elements, that was a state of mind that would prevent him from acting with entire impartiality and without prejudice to the substantial rights of appellant. (*Davis* v. *Walker*, 60 Ill. 452; *State* v. *Brown*, 15 Kan. 400.) Intent was one of the elements of the offense; knowledge of the character of the article was another element; and the question, whether or not the article itself was of a character to incite or inflame resistance to the State Council of Defense was one of the substantial issues in the case.

The appellant attempted to prove that he had consulted an attorney at law regarding the validity of the order made by the Council of Defense and which gave rise to the article complained of, and was by him advised that the order was illegal and void, and that the appellant could lawfully disregard the same. But the testimony was excluded. The advice of an attorney is admissible in any case where a criminal intent is a necessary ingredient of the offense. The following cases illustrate the rule: The advice of an attorney that the defendant was entitled to take and carry away the property is admissible in a prosecution for larceny (8 Ency. of Evidence, 131; *People* v. *Schultz*, 71 Mich. 315, 38 N. W. 868). It is admissible in cases of malicious mischief (8 Ency. of Evidence, p. 3871); in malicious prosecution (*Id.*, p. 403); and in libel and slander (*Id.*, p. 380). In a case such as this, where a specific unlawful intent is a necessary ingredient of the offense, the advice received by defendant and his belief therein bore directly upon a principal issue in the case. The evidence should have been admitted.

Over the objection of the defendant, the court gave to the jury as one of its instructions the whole Sedition Act. The instruction involved many elements in no manner connected with the case on trial, and the jury were in effect told that they were not limited to trying the defendant upon the charge contained in the information, but might find him guilty if they

concluded that he violated any provision of the Act. The instruction should have been confined to the issues in the case. (*Bullard* v. *Smith*, 28 Mont. 387, 410, 72 Pac. 761; *First Nat. Bank* v. *Carroll*, 35 Mont. 302, 317, 88 Pac. 1012; *State* v. *Trosper*, 41 Mont. 442, 446, 109 Pac. 858.) This instruction, not being warranted by the pleadings or the evidence, should not have been given to the jury.

Mr. S. C. Ford, Attorney General, and *Mr. Otto A. Gerth*, Assistant Attorney General, for Respondent, submitted a brief; *Mr. Gerth* argued the cause orally.

It is the rule of law that a party to an action, be it the state or the defendant in a criminal prosecution, has no right to put to the proposed juror a hypothetical set of facts such as was attempted by appellant, and ascertain from him in advance as to how he is going to vote in a verdict. The case of *State* v. *Huffman*, 86 Ohio, 229, Ann. Cas. 1913D, 677, 99 N. E. 295, is one which clearly announces the rule as above stated. It is held in this case generally that questions hypothetical in nature tend to coach the jury or the jurors to obstinacy, erroneous views of the evidence, and also erroneous views of the law. These questions tend to commit the jury to certain views and make them promise in advance what they intend to do at the conclusion of the trial. The case cites authorities and announces the proposition that a juror not only has the right but should take into consideration the views of his fellow-jurors in arriving at a verdict. Hypothetical questions as a rule, therefore, lead the juror to believe that he has no right to consider the views of his fellow-jurors. (*Allen* v. *United States*, 164 U. S. 492, 41 L. Ed. 528, 17 Sup. Ct. Rep. 154 [see, also, Rose's U. S. Notes]; *State* v. *Bokien*, 14 Wash. 403, 44 Pac. 889; *Commonwealth* v. *Van Horn*, 188 Pa. St. 143, 41 Atl. 469; *People* v. *Warner*, 147 Cal. 546, 82 Pac. 196.)

Testimony as to whether the article for which appellant was prosecuted did or did not incite or inflame resistance to the Montana Council of Defense is not permissible in cases of this

kind. It is for the jury to determine exclusively whether the article incited or inflamed resistance to the Montana Council of Defense or whether it has that effect. Evidence directly upon that proposition is incompetent as invading the province of the jury. As to what particular effect the article had upon the particular witness would be no criterion upon the proposition of whether or not it was reasonably calculated to incite resistance to the Montana Council of Defense. Therefore, the evidence which was rejected was properly rejected as incompetent and not tending to prove or disapprove any issue in the case.

The same contention has been raised in all of the sedition cases, both state and federal, but in a slightly different form. For instance, it is contended that an article in order to come under the condemnation of the Sedition Act must be shown to have been given to or circulated among persons within the draft age. The contention is usually made that an article shown to or circulated among men beyond the draft age or among women and children can do no harm. The courts, however, universally have overruled such a contention and that establishes a direct precedent for our contention in this instance. (*State* v. *Kahn*, 56 Mont. 108, 182 Pac. 107; *Kirchner* v. *United States*, 255 Fed. 301, 303.) The appellant has raised the same proposition which has been raised in every sedition case and which without exception has been ruled upon adversely thereto by every court in the land. It is this: The state has failed to prove an offense under the Sedition Act for the reason that the article upon which the prosecution was based was not shown to persons who could be influenced against the government's war program. In *Kirchner* v. *United States*, *supra*, practically the same kind of question was raised under the Federal Espionage Act. The court held in effect that the government need not show the effect of an article. An article may have its pernicious effect upon many branches of government war activities. There are many properly recognized war

instrumentalities in connection with the war, even though outside of actual military operations.

Opinion—PER CURIAM.

The defendant was convicted of the crime of sedition and appealed from the judgment.

The information charges that the defendant willfully and feloniously did write, print and publish of and concerning the Montana Council of Defense a statement (which is set forth in the information, but which is too long to be here reproduced), which contained, among other things, the following: "Fortunately they have no legal status or authority. They can fulminate to their heart's content against anything and everything that menaces their master's interest, but no one need pay any attention to them." It is charged that this statement so published was calculated to incite and inflame resistance to the Montana Council of Defense, a duly constituted state authority in connection with the prosecution of the war. Counsel for defendant made 107 assignments of error, but such of these as require special consideration may be grouped under a comparatively few heads. A number of the contentions have been determined adversely to defendant in other sedition cases recently decided.

Upon the *voir dire* examination, counsel for defendant [1, 2] propounded to the juror Ellis this question: "Q. And if, after hearing all of the evidence in this case, there was a reasonable doubt in your mind as to whether or not this article in question was calculated to inflame or incite resistance to the State Council of Defense, would you give the defendant the benefit of the doubt and vote for his acquittal?" An objection by the county attorney was sustained, and the juror was not permitted to answer. The same question was asked the juror Porter, with the same result. In each instance the court erred.

The defendant was prosecuted under the provision of the Sedition Act (Laws Ex. Sess. 1918, Chap. 11), which provides: "Whenever the United States shall be engaged in war, any

person or persons who * * * shall utter, print, write or publish any language calculated to incite or inflame resistance to any duly constituted federal or state authority in connection with the prosecution of the war, * * * shall be guilty of the crime of sedition."

The purpose of the *voir dire* examination of veniremen is to enable counsel to determine whether there exists a state of mind on the part of any juror which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party, which the statute (sec. 9261, Rev. Codes) denominates actual bias, and to enable counsel to exercise intelligently the peremptory challenges allowed by law. (*State* v. *Brooks, ante,* p. 480, 188 Pac. 942.) The gist of the offense with which the defendant was charged was that the published statement was calculated to incite or inflame resistance to the Montana Council of Defense in connection with the prosecution of the war. It may be that the error would have been cured if the court had instructed the jury, as it should have done, that in order to justify a conviction they must find from the evidence beyond a reasonable doubt that the statement was calculated to incite or inflame resistance to the Montana Council of Defense in connection with the prosecution of the war; but the court failed to give any instruction upon the subject, and from this omission, and from the ruling upon the question now under consideration, the jurors must have understood that the allegation of the information that the statement was calculated to incite or inflame resistance was an immaterial one, or one upon which it was not necessary for the jury to find. In other words, the effect of the court's ruling, and its failure to instruct upon this subject, was to take from the jury the determination of the principal question involved in the trial [3] and to determine it as one of law. It matters not how conclusive the evidence upon any essential element of the charge may appear to be, the constitutional guaranty of trial by jury absolutely precludes the court from assuming that the fact is proved.

Many errors are assigned on the rulings of the trial court in [4–6] the examination of jurors and of witnesses, and in the settlement of instructions, in consistently excluding the theory of the defense that the intent or intention of defendant and his colleague, Dunn, in either writing, printing, uttering or publishing the article in question, is a necessary ingredient of the crime charged. These specifications raise but two questions: (1) As to the admissibility of evidence of the intent to "incite or inflame resistance," *etc.;* and (2) as to the intent of the defendant to publish the article, and call for a determination as to what intent, if any, must be established by the state in order to warrant a conviction in sedition cases.

The validity of the Sedition Act was upheld by this court in the case of *State* v. *Kahn,* 56 Mont. 108, 182 Pac. 107, and in that case, and in the later case of *State* v. *Wyman,* 56 Mont. 600, 186 Pac. 1, this court gave the question of intent some consideration, although in neither case was it necessary to go into the matter fully. In the *Kahn Case* we said: "Sedition is a purely statutory offense, and our Act is declared to be, and is in fact, a general police regulation. It is elementary that for the preservation of the peace, the safety of the people, and the good order of society the legislature may prohibit certain acts, and attach a penalty for disobedience, without including any evil intent as an ingredient of the offense other than the general intent implied from a violation of the statute [citing 12 Cyc. 148; 8 R. C. L. 62]. But the provision of the statute is 'shall utter language calculated to incite or inflame resistance,' *etc.* Primarily the word 'calculate' means to compute mathematically, and it implies power to think, to reason, to plan. In its broader significance it means to intend, to purpose, to design. (Century Dictionary; Standard Dictionary.)"

In the *Wyman Case* we said: "The same [that the question was disposed of by the *Kahn Case*] is true of appellant's contention that the sedition law is defective, in that it * * * omits the 'basic element of "intent" altogether'; the *Kahn Case* laying down the rule that the Sedition Act, being purely

statutory, is valid, though intent is not made an ingredient, and that, if the intent were needed, the word 'calculated' is sufficiently broad to include intent [quoting the above excerpt from the *Kahn Case*]."

In the consideration of these cases we might well have omitted the reference to any analogy between "calculated" and "intended," as having no place in the opinion, and based our conclusion squarely on the principle quoted from Cyc. in the *Kahn Case*.

While it is true that our statute declares that "in every crime there must be a union or joint operation of act and intent," the statute is but declaratory of the common-law rule (Bishop's New Crim. Law, Chap. 18; 16 Corpus Juris, 75), and an exception to this rule, in so-called "statutory crimes" enacted under the police power of the state, is recognized by the great weight of authority. As stated in the *Kahn Case:* "Our Act is declared to be, and is in fact, a general police regulation."

The writer on the subject of "Intent," in 16 Corpus Juris, page 76, disposes of this question as follows: "The legislature * * * may forbid the doing of an act, and make its commission criminal, without regard to the intent or knowledge of the doer; and, if such legislative intention appears, the court must give it effect, although the intent of the doer may have been innocent [citing cases from a large per cent of the states]. This rule has been generally, although not quite universally, applied in the enforcement of statutes passed in aid of the police power of the state." A like rule is announced in 12 Cyc. 148; 8 R. C. L. 62.

The legislative intention in the enactment of a statute, if ascertainable, is controlling. "It is both a common-law and a statutory rule of construction of statutes that the intention of the legislature must be discovered, and, if possible, pursued." (*Power* v. *County Commrs.*, 7 Mont. 82, 14 Pac. 658; *Lerch* v. *Missoula Brick & Tile Co.*, 45 Mont. 314, Ann. Cas. 1914A, 346, 123 Pac. 25.) Happily, in this instance, the wording of the

statute itself clearly indicates the intention of the legislature as to the crime charged against this appellant.

An analysis of section 1 of the Act discloses that, while a large number of prohibited acts are embraced within a single section, they naturally fall into eight distinct subdivisions, to-wit:

"Whenever the United States shall be engaged in war, any person * * *

"(1) Who shall utter, print, write or publish any disloyal, profane, violent, scurrilous, contemptuous, slurring or abusive language about the * * * government of the United States, * * * or the soldiers or sailors of the United States; * * *

"(2) Or any language *calculated* to bring the form of government of the United States, * * * or the soldiers or sailors of the United States, or the flag of the United States, or the uniform of the army or navy of the United States, into contempt, scorn, contumely or disrepute;

"(3) Or shall utter, print, write or publish any language *calculated* to incite or inflame resistance to any duly constituted federal or state authority in connection with the prosecution of the war;

"(4) Or who shall display the flag of any foreign enemy;

"(5) Or who shall by utterance, writing, printing, publication or language spoken, urge, incite or advocate any curtailment of production in this country of any thing or things, product or products necessary or essential to the prosecution of the war in which the United States may be engaged *with intent* by such curtailment to cripple or hinder the United States in the prosecution of the war;

"(6) Or, * * * shall willfully make or convey false reports or statements *with intent* to interfere with the * * * success of the military or naval forces of the United States, or promote the success of its enemy or enemies;

"(7) Or * * * shall willfully cause * * * disaffection in the military or naval forces of the United States;

"(8) Or who shall by uttering, printing, * * * publication, language spoken, or by any act or acts, interfere with, obstruct, or attempt to obstruct, the operation of the national selective draft law or the recruiting or enlistment service of the United States *to the injury* of the military or naval service thereof, shall be guilty of the crime of sedition."

Thus dividing the Act into its component parts, it will be readily seen that, as to those subjects falling in subdivisions 1 and 4, the prohibition is against the doing of the act itself, no matter what the intent or what the result thereof may be, while, as to those falling in subdivisions 2 and 3, the legislature also omitted the element of intent, but made the guilt or innocence of the accused depend upon whether the language used was "calculated" to bring about the undesirable results enumerated.

Coming down to subdivisions 5 and 6, we find that the legislature was not unmindful of the element of intent in criminal offenses, and, as to the acts here enumerated, made the intent of the offender the gist of the crime; while, as to those acts included in subdivision 7, they again excluded the question of intent, but made the law applicable to those persons only who commit the forbidden acts "willfully"; and under subdivision 8 they again prohibit the commission of certain acts without regard to intent, but provide for punishment only in case those acts result in actual injury to the military or naval forces of the United States.

It is therefore apparent that, in drafting the Act, the legislature exhibited a nice discrimination in the treatment of the several subjects under consideration, as constituting the crime of sedition, and that, whenever that body deemed a specific intent a necessary ingredient of the crime defined, it had no hesitancy in including it in the definition of the crime; and when it felt, for the peace and safety of society, an act should be prohibited, regardless of the intent of the doer of that act, it had as little hesitancy in excluding that element from its definition. It is clear from this analysis that, as to the acts

here complained of, the legislature intended to prohibit the writing, printing, uttering or publication of any language likely to incite or inflame resistance to any duly constituted federal or state authority in the prosecution of the war, regardless of the intent or intention of the offender—to prevent, at all hazards, the results likely to flow from the commission of the act itself.

As it appears that the legislature included the element of intent in the definition of the crime of sedition in certain of the subdivisions indicated, and enumerated all the elements that body considered essential to the crime as defined in the subdivision under consideration, the element of intent was manifestly excluded, as an essential ingredient of the crime as here charged, both by the clear intention of the legislature and under the rule "*expressio unius est exclusio alterius.*" The rule heretofore announced, under which the legislature is conceded to have the authority so to provide, is in conformity with the former decisions of this court and with the great weight of authority throughout the United States.

In the case of *State* v. *Rechnitz,* 20 Mont., at page 491, 52 Pac., at page 265, this court said: "We do not lose sight of the fact that the rule above discussed is not inflexible, and that many acts may become crimes by violation of statutes relating to certain subject matters, and that a statute may be so worded as to make an act criminal without regard to the question of the intent of the person doing such act."

In the case of *Leggatt* v. *Prideaux,* 16 Mont. 205, 50 Am. St. Rep. 498, 40 Pac. 377, this court quoted with approval from *Gardner* v. *People,* 62 N. Y. 299, as follows: "The rule on the subject appears to be that in acts *mala in se* the intent governs, but in those *mala prohibita* the only inquiry is: Has the law been violated?"

In *State* v. *Gilbert,* 141 Minn. 263, 169 N. W. 790, the supreme court of Minnesota, in passing on a statute prohibiting teaching or advocating nonenlistment, *etc.,* said: "The statute makes teaching or advocating nonenlistment or nonaid unlaw-

ful. It does not make the intent of the teacher or advocate an ingredient of the offense. The statute is a police regulation, and under it the doing of the forbidden act is a criminal offense, regardless of the intent."

"There is a well-recognized distinction between acts *mala in se* and *mala prohibita*. Under the latter it is well settled that criminal intent forms no part or element of the offense." (*People* v. *D'Antonio*, 150 App. Div. 109, 134 N. Y. Supp. 657; see, also, *People* v. *Werner*, 174 N. Y. 132, 66 N. E. 667.) "It is the province of the legislature to determine in the interest of the public what shall be permitted or forbidden, and the statutes contain very many instances of acts prohibited, the criminality of which consists solely in the fact that they are prohibited, and not at all in their intrinsic quality." (*People* v. *West*, 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E. 610; 16 Corpus Juris, 77, note a.)

The supreme court of Michigan, in upholding a statute forbidding certain acts without regard to the intent, said: "As a rule there can be no crime without a criminal intent; but this is not by any means a universal rule. * * * Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible." (*People* v. *Roby*, 52 Mich. 577, 50 Am. Rep. 270, 18 N. W. 365.) This case is cited with approval in *People* v. *Snowberger*, 113 Mich. 86, 67 Am. St. Rep. 449, 71 N. W. 497, where many cases upholding the doctrine are cited, and where it is said: "Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety. If it passes an Act ostensibly for the public health, and thereby destroys or takes away the property of the citizen or interferes with his liberty, it is for the courts to determine whether it relates to and is appropriate to promote such public health. Under the police power, the conduct of individuals and the use of property may

be regulated, so as to interfere to some extent with the freedom of the one and the enjoyment of the other. It cannot be doubted that the legislature intended by this Act to protect the public against the harmful consequences of sales of adulterated food, and, to the end that its purpose might not be defeated, to require the seller, at his peril, to know that the article which he offers for sale is not adulterated. As was said by the supreme court of Ohio in *State* v. *Kelly*, 54 Ohio St. 166: 'If this statute had imposed upon the state the burden of proving * * * his knowledge of its adulteration, it would have thereby defeated its declared purpose.'" (*Kelley* v. *Daily Co.*, 56 Mont. 63, 181 Pac. 326.)

In the case of *State ex rel. Rowe* v. *District Court*, 44 Mont. 318, 119 Pac. 1103, this court said: "When an act is in general terms made indictable, a criminal intent need not be shown, unless from the language of the law applicable a purpose to require the existence of such an intent can be discovered [citing cases]. In *State* v. *McBrayer*, 98 N. C. 619, 2 S. E. 755, in considering a statute prohibiting a sale of intoxicating liquor, the court said: 'It is a mistaken notion that positive, willful intent, as distinguished from a mere intent, to violate the criminal law is an essential ingredient in every criminal offense, and that where there is the absence of such intent there is no offense; this is especially so as to statutory offenses. When the statute plainly forbids an act to be done, and it is done by some person, the law implies conclusively the guilty intent, although the offender was honestly mistaken as to the meaning of the law he violates. When the language is plain and positive, and the offense is not made to depend upon the positive, willful intent and purpose, nothing is left to interpretation.'" After citing many other authorities, the court concludes: "Though in every public offense there must exist a union of intent and act (Rev. Codes, sec. 8112), in statutory offenses, such as this, the intent is conclusively presumed, when it is shown that the statute has been violated."

It is therefore apparent that the intention of the writer of the objectionable article, in deliberately writing the same, or of the printer, or of those persons who deliberately publish the articles so written or printed, is wholly immaterial and not an ingredient of the crime charged, and therefore the court committed no error in sustaining objections to questions concerning such intent, whether propounded to prospective jurors or to witnesses.

Specifications 70 and 71 are based on the court's refusal to [7] include in the instructions the provisions of sections 8112 and 8113 of the Revised Codes; instead, the court gave the following, as instruction No. 8: "The court instructs the jury that in every crime or public offense, there must be a union or joint operation of act and intent, but that in statutory offenses, such as the case on trial, if the state first proves, beyond a reasonable doubt, that the statute has been violated, then the intent above mentioned is conclusively presumed."

While, ordinarily, the statutory provisions concerning intent should be given, as offered by the defense, the offered instructions were intended to apply to the intent heretofore discussed, and, as offered for that purpose, the court did not err in its [8] refusal. Instruction No. 8, however, while it follows the language used in *State ex rel. Rowe* v. *District Court, supra*, in the statement of a principle of law, is, as an instruction, inapt and incorrect and is misleading to the jury; it does no more than to advise the jurors that, if the defendant is proven guilty, a guilty intent is "conclusively presumed." Of what aid was the instruction to the jury? The question for them to solve was: Did the defendant violate the provisions of the statute? Its determination involved the questions as to whether the article was published by the defendant and was "calculated" to "incite or inflame resistance," *etc.* And if the intent to incite and inflame resistance was the only element of intent which could enter into the commission of the act, it might be said that, though erroneous, the instruction could not have prejudiced the defendant, for it could not then have

had any effect on the minds of the jurors in arriving at a verdict.

However, section 7961, Revised Codes, provides that "the following presumptions, *and no others*, are deemed conclusive: 1. A malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another." While section 7962 provides: "All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind: * * * 2. That an unlawful act was done with an unlawful intent." Now, while a malicious and guilty intent is conclusively presumed from the *deliberate* commission of an unlawful act for the purpose of injuring another, the element of intent which must enter into the commission of the crime here charged, does not come within that classification: *i. e.*, the general intent, *viz.*, to publish the article in question.

This brings us to the consideration of specification 66, the [9–11] defendant's offer to prove that he did not "on August 16, 1918, or at any other time, intend to *publish, write, print, or utter the editorial* entitled 'The State Council Again,' or any other article of similar import." The "deliberate commission" of an act necessarily includes the intent to commit the act. The presumption that "an unlawful act was committed with an unlawful intent" is disputable, and, considered as evidence, "may be controverted by other evidence." While the publication of the article entitled "The State Council Again" might be punishable under subdivision 3 of section 1, as heretofore divided, a conviction could be had only if the act was deliberately or intentionally committed, and, although the intent to publish the article might be drawn from the surrounding facts and circumstances, if the defendant was in the possession of facts from which the jury might have reasonably drawn the conclusion that he did not intend to publish the article at all, as, for example, that it was published without his knowledge or against his express command, or through the negligence

or misconduct of an employee, those facts should have gone to the jury, to be weighed against the disputable presumption of intent arising from the commission of the act. This the court did not permit, but, without discrimination, sustained objections to all questions concerning any intent whatsoever. Thereupon defendant made his offer, and the court, consistently, sustained the state's objection. The objection should have been overruled, and the facts, if any the defense had, admitted, to be considered under appropriate instructions on the subject. The court's failure to do so was erroneous.

Specification No. 100 predicates error on the court's refusal [12] to give offered instruction 38, which, if properly drawn to cover the question just discussed, would have been proper; but, as it appears from the testimony that Smith was the vice-president of the company publishing the article, a greater burden was upon him than that defined in the proposed instruction. We apprehend that "mere failure to prevent its publication" would not exonerate the accused, had he known of the proposed publication in time to prevent it, and therefore the court was justified in refusing the proposed instruction.

In specification No. 102, the appellant urges that the court [13–16] erred in giving instruction No. 4, which reads as follows: "You are instructed that the crime of sedition as applied to this case is complete if you find from the evidence, beyond a reasonable doubt, that at the county of Lewis and Clark, state of Montana, at any time subsequent to February 22, 1918, and prior to the filing of the information herein, and while the United States be engaged in war, the defendant did unlawfully, willfully, wrongfully, feloniously, and seditiously do or commit any of the following acts, to-wit: Utter, or write, or print, or publish any language calculated to incite or inflame resistance to any duly constituted state authority in connection with the prosecution of the war." It is urged that the instruction does not properly apply to the facts; that there is no evidence that the defendant did utter, write, or print any language, but was responsible, if at all, only for the publication;

and that the instruction does not confine the issues to language calculated to incite or inflame resistance to the Montana Council of Defense.

While the instruction is approximately a correct statement of an abstract rule of law, and would have been harmless, had it been followed by other instructions applying that law to the facts in this case, the record discloses no such instructions, while the instruction given advises the jurors that they may find the defendant guilty if they find that he had, at any time between February 22, 1918, and the date of the filing of the information, uttered, written, printed or published, in Lewis and Clark county, *any language* calculated to incite or inflame resistance *to any duly constituted* state authority in connection with the prosecution of the war. "Although an instruction may state a correct principle of law, if it is not based upon or in conformity with the issues or facts raised or supported by the evidence, it is erroneous." (16 Corpus Juris, 1043, and note.) "In reading the statute, it is error for the court to read that portion thereof which does not define the crime charged, but defines another and distinct crime, unless he expressly limits the application of the statute to the charge." (12 Cyc. 614, and note.)

In determining the correctness of instructions, the rule is that they must be examined in their entirety, and where, as a whole, they correctly state the law and where those instructions general in their nature, are by specific instructions limited to the facts in the case, error cannot be predicated on an incomplete or too general instruction. (*State* v. *Brooks*, 23 Mont. 146, 57 Pac. 1038; *Territory* v. *Hart*, 7 Mont. 489, 17 Pac. 718.) We have searched the record in vain for an instruction limiting the one under consideration to the facts of this case.

No attempt was made to prove that Smith either wrote or printed the article complained of in Lewis and Clark county, and he could be convicted, if at all, only of its publication in that county; and, of course, he could not be convicted on proof of the writing, printing, uttering or publication of any article

other than that set out in the information, no matter how vicious or seditious such article might have been. In a prosecution of this nature, proof of other acts are admissible for certain purposes; but, under such an instruction as we are considering, the accused might be convicted of the commission of *any* act of a similar nature, though the proof utterly failed to establish his guilt of the crime charged. That this cannot be is elementary. An information must charge but one offense, and the accused can be convicted only of the offense so charged. As was stated in the case of *State* v. *Gaimos*, 53 Mont. 118, 162 Pac. 596: "When the information fixes a date, and the evidence shows an act of the character charged as a crime at that time, the state cannot be allowed to claim a conviction under that information for a similar act at some other time."

In the absence of an instruction directing the jury to return a verdict based upon the specific offense charged in the information, instruction No. 4 was prejudicially erroneous. "An instruction should be so explicit and so closely connected with the facts of the case as to enable the jury to apply the law to the facts. It must present the law substantially and correctly and in such a way that it will be understood by the jury." (12 Cyc. 645; *Ritte* v. *Commonwealth*, 18 B. Mon. (Ky.) 35; *Farrar* v. *State*, 29 Tex. App. 250, 15 S. W. 719; *Ashlock* v. *State*, 16 Tex. App. 13.)

In instruction No. 17 the court advised the jury that "It is not necessary to prove all three of the acts mentioned, to-wit, write, print, publish; but it is sufficient if the state proves any one of these, *viz.*, that the defendant wrote, or that the defendant printed, or that the defendant published the language complained of in Lewis and Clark county, Montana." In so far as it covers the subject, the instruction correctly stated a general proposition of law; but, as there was no evidence adduced and no contention on the part of the prosecution that the defendant either wrote or printed the article complained of, the instructions should have been limited to the question of publication in Lewis and Clark county.

"The sufficiency and correctness of instructions must be determined with reference to the evidence, and therefore a charge which asserts correctly an abstract proposition of law, but is not applicable to the evidence, or which is based upon the assumption of the existence of material facts of which there is no evidence, should not be given." (12 Cyc. 651.) In the absence of any evidence tending to prove that the defendant either wrote or printed the article complained of in Lewis and Clark county, it was error to instruct the jury that he could be convicted of either writing or printing the article. Such an instruction could serve no good purpose, and, in the absence of evidence on which to base it, the instruction should not have been given, as it could only tend to mislead and confuse the jury.

Error is predicated upon the court's ruling permitting the [17] witness Winters to testify from a transcript made by him of his shorthand notes concerning proceedings had before the State Council of Defense, upon the ground that the notes, and not the transcript, constituted the best evidence. The witness, however, stated that his original notes had not been preserved, and, in effect, that the transcript was an accurate reproduction of translation thereof. As said by the supreme court of Indiana, in the case of *Bass* v. *State*, 136 Ind. 165, 36 N. E. 124: "When the official stenographer is called, * * * his shorthand notes must be translated, either by himself or someone else who is able to do so. It being necessary that they should be translated, we think it wholly immaterial whether it is done orally or in writing. In this case it was done in writing. There is no claim that it was not done correctly. We think the court did not err in permitting Spencer [the stenographer] to read a transcript of the evidence." (See, also, *Barber* v. *State*, 64 Tex. Cr. 96, 142 S. W. 577; *Mackmasters* v. *State*, 83 Miss. 1, 35 South. 302; *State* v. *Gentry*, 86 Kan. 534, 121 Pac. 352; *Fletcher* v. *State*, 20 Wyo. 284, 123 Pac. 80.)

It is true that the county attorney did not lay a very complete foundation for the introduction of the testimony, and it

also appears that, when the defendant's attorney sought to question the witness concerning the accuracy of the transcript, the court refused to permit it. As the case must be reversed on other grounds, it is not necessary to go into this matter in detail. While it is better practice for the stenographer to read from his notes, we can see no objection to permitting him to testify from the transcript, in the event a sufficient foundation is laid establishing his ability to report the testimony accurately, the accuracy of the notes and transcript, allowing the defendant to inquire fully into the matter to test the stenographer's competency and accuracy, with the right to insist upon the production of the original notes if such are in existence, and, if necessary, to require the stenographer to read from his notes, to test the accuracy of the transcript. A liberal cross-examination should be permitted, and, if timely application is made, the defendant should be permitted the right to ask preliminary questions to test the accuracy of the notes and transcript.

The article which is the basis of the charge against the [18] defendant appeared as an editorial in the "Weekly Bulletin" of August 16, 1918. Upon the trial, with the witness Winters on the stand testifying concerning certain statements made by the defendant before the State Council of Defense, which were reported stenographically by the witness, Winters read from a transcript of his notes the following, to which objections were made and overruled: "Q. 'Were you responsible afterward for publishing the statement that you knew nothing about this order that appeared in the August 3 issue, I think it was, or September 3? Mr. Smith: Yes. Mr. Campbell: In black type? Mr. Smith: Yes; Mr. Dunn wrote it. I asked him to write it. Mr. Campbell: You are absolutely responsible personally? Mr. Smith: Personally responsible. Mr. Campbell: For the editorial that Mr. Dunn wrote and the denial of the fact that you had ever received notice? Mr. Smith: Yes, sir.'" Later, a motion to strike this testimony from the record was made, upon the ground that the same did not refer to the publication constituting the offense with which the defendant

was charged. In connection with the motion the defendant's attorney said: "That does not refer to the editorial here in question. The County Attorney: We submit that it does. The Court: Yes. I overrule the motion to strike."

From a reading of the testimony above set forth, it plainly appears that defendant admitted his responsibility for writing the editorial of September 3; but the court and county attorney assumed that the defendant admitted responsibility for writing the editorial of August 16. The introduction of this testimony standing by itself, and the refusal of the court to strike the same, might be regarded as harmless error; but in view of the court's instruction numbered 4, in which the jury were advised that the crime was complete if the defendant wrote, printed or published "any language," *etc.*, the testimony should have been excluded. In addition, the error was emphasized by the remarks of the county attorney and the court's affirmation of the same in the words used in denying the motion to strike, thereby leading the jury to believe that the defendant, before the State Council of Defense, admitted his responsibility for printing the language set forth in the information.

W. F. Dunn, a witness for the defendant, was asked on [19] cross-examination if he had not been convicted of sedition, and over objection was required to answer and answered in the affirmative. Complaint is made of the court's ruling, but it was clearly correct. (Sec. 8907, Rev. Codes.)

Finally, it is urged that the evidence is insufficient to sustain the verdict. It is to be remembered that the constitutional [20, 21] guaranty of free speech and free press was not suspended by the war, and that no one lost his right to criticise either men or measures. It is only for an abuse of the liberty that one may be called to account for his language, either in peace or in war. Under the stress of war the legislature may define the limits of liberty of speech and make punishable the use of language which in time of peace it would be powerless to restrain, and this is just what was done by the enactment

of the Sedition Act. Under that provision of the statute now before us, it was declared that the use of language calculated to incite or inflame resistance to a duly constituted federal or state authority in connection with the prosecution of the war constituted an abuse of the liberty of speech and press and a crime against the commonwealth.

Though the information charges that the editorial in question was written, printed and published in Lewis and Clark county, there is not any evidence that it was either written or printed here. Eliminating those elements of the charge, and the material allegations of the information now to be considered are: (1) That the editorial was published in Lewis and Clark county; (2) by the defendant; and (3) that it was calculated to incite or inflame resistance to the Montana Council of Defense in connection with the prosecution of the war. The defendant's plea of not guilty put in issue every one of those allegations and imposed upon the prosecution the burden of proving every one of them by competent evidence, beyond a reasonable doubt. **[22]** The allegation that the editorial was published in Lewis and Clark county was indispensable, in order to give the court of that county jurisdiction to try the case, for the Constitution (Article III, section 16) secures to everyone accused of crime the right to "a speedy, public trial by an impartial jury *of the county or district* in which the offense is alleged to have been committed," subject only to the right to a change of venue. This is one of the fundamental guaranties of our Bill of Rights, intended to be honored by its observance, and not defeated by any subterfuge.

The allegation that the published editorial was calculated to **[23]** incite or inflame resistance to a duly constituted federal or state authority in connection with the prosecution of the war was equally necessary in order to state a public offense. In our judgment, the word "calculated" was used advisedly and with appreciative discrimination. After a more critical examination and analysis of the statute, we are satisfied that it was intended to be understood to mean "likely to produce a

certain effect, whether intended or not." The observations heretofore made upon the subject "intent" render further discussion of this matter unnecessary.

The only evidence in support of the allegation that the editorial was published in Lewis and Clark county was given by Mr. Will A. Campbell, who testified that he was a subscriber to the "Bulletin"; that he received his copy of the paper containing the editorial in the due course of the mail, at his office in Helena; that the paper came to him inclosed in a separate wrapper; that he read the editorial in this county; and that he was then a member of the Montana Council of Defense. The [24] attorney general directs our attention to an admission made by the defendant before the Council of Defense on September 9, 1918, to the effect that the "Bulletin" had subscribers in Lewis and Clark county; but the evidence discloses that the witness referred to the "Bulletin," then issued as a daily paper, and evidence of the extent of the circulation of the "Daily Bulletin" on September 9 would not constitute evidence of the circulation of the "Weekly Bulletin" on August 16.

We may assume, for the purposes of this appeal, that the evidence is sufficient to show *a* publication of the editorial in Lewis and Clark county, using the term "publication" in the broad sense of divulgation, promulgation or making known. But it is not every abusive or even libelous statement that [25] constitutes sedition. The language of this editorial might be published in time of war under such circumstances that would not make it a crime. (*Frohwerk* v. *United States*, 249 U. S. 204, 208, 63 L. Ed. 561, 39 Sup. Ct. Rep. 249.) To illustrate from this record: It appears from the evidence that Mr. Campbell exhibited the editorial to the county attorney, and that afterward it was reprinted in the "Helena Independent," a newspaper of which Mr. Campbell is the guiding genius. In each instance there was a publication, but not such a publication as constituted a crime. In other words, to bring the publication under the condemnation of the statute, it must have occurred under such circumstances that the language thus

published was calculated to incite or inflame resistance to a duly constituted federal or state authority in connection with the prosecution of the war. Whether it was or was not calculated to have had that effect was a question of fact to be determined by the jury (*State* v. *Kahn*, above) from all the surrounding facts and circumstances, including the manner and extent of publication, as well as the inherent quality of the language itself.

So far as this record discloses, the defendant was not responsible for the editorial becoming known to any person in Lewis and Clark county, other than Mr. Campbell, who was then a [26] member of the Montana Council of Defense. Can it be said, then, that in the hands of Mr. Campbell alone the published editorial was calculated to incite or inflame resistance to the council? Who but Mr. Campbell could be incited or inflamed to resistance, and is it within the range of probabilities that he would be incited to resist the very organization of which he was a member? We think not.

In the purpose sought to be accomplished and in the means employed to effectuate that purpose, our Sedition Act is not unlike the espionage statute (U. S. Comp. Stats. 1918, Comp. Stats. Ann. Supp. 1919, secs. 20212a–20212h) passed by the Congress of the United States, and concerning a prosecution under that statute the supreme court of the United States said: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." (*Schenck* v. *United States*, 249 U. S. 47, 63 L. Ed. 470, 39 Sup. Ct. Rep. 247.) Applying that rule and paraphrasing the language of this court in *State* v. *Kahn*, above, could the jury find from the evidence, beyond a reasonable doubt, that the natural tendency and reasonably probable effect of the editorial, in the hands of Mr. Campbell alone, was to incite or inflame resistance to the Montana Council of Defense in connection with the prose-

cution of the war? The bare statement of the proposition would seem sufficient for its own complete refutation.

In failing to prove that the defendant was responsible for the editorial being made known in Lewis and Clark county to any person other than a member of the Montana Council of Defense the state failed to prove the offense charged in the information. For the reasons given, the judgment is reversed, and the cause is remanded to the district court of Lewis and Clark county for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

STATE, RESPONDENT, *v.* DUNN, APPELLANT.

(No. 4,411.)

(Submitted April 16, 1920. Decided May 3, 1920.)

[190 Pac. 121.]

(For syllabus, see *State* v. *Smith, ante,* p. 563.)

Messrs. Wheeler & Baldwin, for Appellant, submitted a brief; *Mr. Baldwin* argued the cause orally.

Mr. S. C. Ford, Attorney General, and *Mr. Otto A. Gerth,* Assistant Attorney General, for Respondent, submitted a brief; *Mr. Gerth* argued the cause orally.

Opinion—PER CURIAM.

W. F. Dunn was convicted of sedition, and appealed from the judgment.

In its essential features, this case is not distinguishable from *State* v. *Smith, ante,* p. 563, 190 Pac. 107. Smith and Dunn were charged jointly, though tried separately. The evidence

in each case is substantially the same, and, though there are fewer assignments of error in appellant's brief in this case, the principal errors considered in the *Smith Case* are involved in this one. They need not be considered separately.

Upon the authority of *State* v. *Smith*, the judgment herein is reversed, and the case is remanded to the district court of Lewis and Clark county for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

IN RE SULLIVAN.

(No. 4,169.)

(Submitted April 8, 1920. Decided May 8, 1920.)

[189 Pac. 770.]

Attorneys — License — Revocation—Lack of Patriotism—Suspension—Referees—Findings—When Conclusive.

Referees—Findings—When Conclusive.

1. Where the evidence in a proceeding looking to the revocation of an attorney's license because of lack of moral qualifications, was conflicting, the referee's findings will be adopted.

Attorneys—Lack of Patriotism—Suspension.

2. Suspension of an attorney to whose continuation in office objections were made after admission, upon the ground that he did not possess that high sense of patriotic duty and love of country during the war which is indispensable to the composition of a thoroughly American citizen, for the term of eight months, with leave to apply for reinstatement upon a satisfactory showing of a good moral character, *held* sufficient punishment in view of applicant's youth, inexperience and immaturity of mind.

IN THE MATTER of the application of John F. Sullivan for a license to practice law. Applicant suspended until January 1, 1921, with leave to be then reinstated on showing of good moral character.

Mr. J. J. McCaffery, for Applicant, argued the cause orally.

Mr. C. E. Pew, Amicus Curiae, argued the cause orally.

Opinion—PER CURIAM.

In November, 1919, John F. Sullivan made application to take the bar examination. Due notice was given of the application as required by the rules of this court, and, no objections having been made, he was permitted to take the examination, and having passed the same satisfactorily, an order was entered that he be admitted, and a certificate was issued. Almost immediately thereafter objections in writing were lodged with this court, in which objections it was charged that during the recent World War, Sullivan had expressed himself as opposed to the war, and had apparently made every effort to avoid military service. Reference was also made in the objections to the previous attempt by Sullivan to gain admission to the bar in 1916, to the proceedings had upon that application, and to his unsuccessful attempt to secure admission in the state of Utah. The objectors excused themselves for not having presented the objections within the time designated for that purpose, and they were permitted to be filed, and Sullivan was called upon to answer. The answer interposed is a denial of each and every charge which relates to his war record. The matter was submitted to H. G. McIntire, referee appointed to take the testimony and report his findings and recommendations. The referee has found that: (1) In April, 1917, while this country was engaged in war, Sullivan expressed himself as follows: "Any time that my country gets me to fight for it, it has got to force me." (2) That he expressed it as his opinion that the United States had no cause for war, declared that if his friends felt as he did none of them would be found on the battle front, and generally attempted to justify Germany's acts of aggression, regardless of their effect upon this country. (3) That in June of the same year he said that he had not registered for the draft, did not have to register, and was not going to regis-

ter. (4) That in response to an inquiry why he did not volunteer, he said, "Any time they want me they will have to come and get me." (5) That in June, 1918, a person nicknamed "Sleepy" Sullivan stated to one O'Leary, then in the uniform of a soldier, "That is one thing they will never see me in," and the referee finds that the Sleepy Sullivan referred to is this applicant.

Upon the hearing in this court it was earnestly urged that [1] the evidence is insufficient to sustain these findings, or any of them. With respect to the last finding it may be said that the evidence is in such condition as to leave the question of Sleepy Sullivan's identification somewhat in doubt. The evidence throughout is in substantial conflict; but this court was fortunate in securing as referee a man of profound learning and wide experience—a leader of the bar of this state for thirty years—whose findings command the greatest respect. Furthermore, the referee saw the witnesses on the stand, heard them testify and observed their demeanor, and is therefore in a much more advantageous position to judge of their credibility than are the members of this court, who must resort to the printed record alone.

We deem it unnecessary to consider the last finding, but in all other respects the findings of fact made by the referee are approved and adopted. They point unerringly to the conclusion that Sullivan did not possess that high sense of patriotic duty and love of country which inspired our young men generally, and which were by the common consensus of public opinion indispensable to the composition of a thoroughly American citizen.

For his misconduct in deceiving this court in 1916, Sullivan was punished severely, and we think adequately, when all the surrounding circumstances are considered. For his lack of [2] moral fiber sufficient to impel him to seek, rather than avoid, military service, and for his opinion upon the merits of the cause for war, his severest punishment will be righteous contempt of his loyal fellow-citizens. However, we are not

prepared to say that the applicant is so far deficient in moral character that he cannot become a useful member of society and an honorable and useful member of the bar of this state. His youth, inexperience and immaturity of mind offer something in mitigation, if not in excuse, of his conduct.

To the end that the applicant may be given every fair opportunity to acquire a proper sense of appreciation of the duties of good citizenship, we do not close this door of opportunity against him altogether. Instead of undoing what has been done heretofore, the same purpose may be served by this present disposition.

It is ordered that John F. Sullivan be, and he is hereby, suspended from his office as attorney and counselor at law until the first day of January, 1921, when he may be reinstated upon a satisfactory showing that he is a man of good moral character and worthy the respect and confidence of his fellowmen.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

BEARTOOTH STOCK CO., APPELLANT, v. GROSSCUP, RESPONDENT.

(No. 4,563.)

(Submitted April 9, 1920. Decided May 3, 1920.)

[189 Pac. 773.]

Attachment—When Writ Does not Lie.

1. Attachment does not lie in an action by the buyer of hay at an agreed price per ton, to recover damages from the seller because of the inferior quality of the hay delivered, the action not being one upon a contract for the direct payment of money and hence not falling within the class of cases in which, under section 6656, Revised Codes, attachment may issue.

Appeal from District Court, Lewis and Clark County; R. Lee Word, Judge.

ACTION by the Beartooth Stock Company against Thad. G. Grosscup. From an order dissolving an attachment, plaintiff appeals. Affirmed.

Messrs. Day & Mapes, for Appellant, submitted a brief; *Mr. E. C. Day* argued the cause orally.

The sole question in the case is whether or not an action by the buyer of hay at a specified price per ton, who has paid the purchase price, to recover from the seller damages by reason of the fact that the hay was not of the grade specified and was unfit for use is such an action as comes within the meaning of the statute authorizing a writ of attachment in an action upon a contract, express or implied, for the direct payment of money. The district judge based his ruling upon the opinion of this court in the case of the *Ancient Order of Hibernians, etc.*, v. *Sparrow*, 29 Mont. 132, 101 Am. St. Rep. 563, 1 Ann. Cas. 144, 64 L. R. A. 128, 74 Pac. 197. The expression in that opinion that the contract must be not only unconditional and absolute but for the payment of a definite sum, was outside of the issues involved in the case, and to that extent the opinion was but the expression of a *dictum*. That this is the correct interpretation of that decision is apparent from a reading of the opinion in the case of *American Surety Co.* v. *Kartowitz*, 54 Mont. 92, 166 Pac. 685, in which the court holds that an action by a surety on a guardian's bond against a principal to recover the amount of a judgment which the surety had paid was an action on a contract in which a writ of attachment should issue. The difference between that case and the one at bar is not discernible.

That an action upon a contract for damages for a breach of the contract is an action for the direct payment of money has been decided by the supreme court of California. (*Donnelly* v. *Strueven*, 63 Cal. 182.) It is not necessary that the definite amount of the defendant's liability should appear upon the face of the contract. It is sufficient that the contract furnish the measure of damages, and even this can be aided by the allega-

tions of the complaint. (*De Leonis* v. *Etchepare*, 120 Cal. 407, 52 Pac. 718.) In Colorado, also, it has been held that where the liability is imposed by statute, the action to enforce the liability is upon a contract for the direct payment of money, and is such an action as entitles the plaintiff to a writ of attachment. (*Adams* v. *Clark*, 36 Colo. 65, 10 Ann. Cas. 774, 85 Pac. 642; see, also, 2 R. C. L., p. 814, sec. 17; *Gutta-Percha Rubber Co.* v. *Mayor*, 108 N. Y. 276, 2 Am. St. Rep. 412, 15 N. E. 402; *Meyer* v. *Brooks*, 29 Or. 203, 54 Am. St. Rep. 790, 44 Pac. 281.)

To construe the statute in such a way as to limit the cases in which writs of attachment can be issued to those only in which the contract itself furnishes a definite sum to be recovered would be to defeat the right to the writ in the greater number of cases in which it is now issued. For example, a writ of attachment could not be issued in an action upon a promissory note where the suit was brought for less than the amount named in the note, because the amount could not be ascertained until after proof had been made of the payments credited upon the note. Numerous other instances may be cited.

Mr. Henry C. Smith, for Respondent, submitted a brief and argued the cause orally.

Citing: *Ancient Order of Hibernians, etc.*, v. *Sparrow*, 29 Mont. 132, 101 Am. St. Rep. 563, 1 Ann. Cas. 144, 64 L. R. A. 128, 74 Pac. 197; *Hochstadler* v. *Sam*, 73 Tex. 315, 11 S. W. 408; *Elliott* v. *Jackson*, 3 Wis. 649; *Schenck* v. *Griffin*, 38 N. J. L. 462; *Heckscher* v. *Trotter*, 48 N. J. L. 419, 5 Atl. 581; *Hough* v. *Kugler*, 36 Md. 186; *Warwick* v. *Chase*, 23 Md. 154, 161; Drake on Attachments, sec. 10; Wade on Attachments, sec. 23.

MR. JUSTICE HURLY delivered the opinion of the court.

The complaint in this action alleges that the plaintiff and [1] defendant entered into a contract in writing for the sale

by defendant to plaintiff of certain alfalfa hay of a certain specified quality to be delivered on board cars in the state of Washington, to be shipped to plaintiff in Montana at an agreed price, payable as deliveries were made, by drafts drawn by the defendant upon the plaintiff; that the hay was not of the quality specified in the contract, was of an inferior grade and unfit for the purposes for which the same was purchased by the plaintiff and for damages sustained by reason thereof. A writ of attachment was issued and served, whereupon a motion to dissolve the attachment was made, which motion was sustained by the trial court. From the order dissolving the attachment, this appeal was taken.

Appellant cites as authorities *Donnelly* v. *Strueven,* 63 Cal. 182; *De Leonis* v. *Etchepare,* 120 Cal. 407, 52 Pac. 718; *Adams* v. *Clark,* 36 Colo. 65, 10 Ann. Cas. 774, 85 Pac. 642; *Gutta-Percha Rubber Co.* v. *Mayor,* 108 N. Y. 276, 2 Am. St. Rep. 412, 15 N. E. 402; *Meyer* v. *Brooks,* 29 Or. 203, 54 Am. St. Rep. 790, 44 Pac. 281.

De Leonis v. *Etchepare, supra,* was an action against an agent to recover certain moneys alleged to have been wrongfully retained by the agent, and for an accounting by him. The court disposes of the question by holding that the moneys received by the agent were not his; that the agency constituted a contractual relation, from which the law implies a contract for the return to the principal of the money retained unlawfully by the agent; and reaffirms the rule adopted by that court in the earlier case of *Hathaway* v. *Davis,* 33 Cal. 161, that where the contract does not furnish the measure of liability, and the damages are unliquidated, an attachment cannot be had; also that it is not necessary, in order to sustain an attachment, that the amount due should specifically appear upon the face of the contract or liability.

Under statutes somewhat similar to ours, other cases may be found wherein attachments were permitted in actions to recover the purchase price paid, where the consideration failed,

or for the recovery of moneys unlawfully converted, *etc.* (See *Suksdorff* v. *Bigham*, 13 Or. 374, 12 Pac. 818; *Hanley* v. *Combs*, 48 Or. 409, 87 Pac. 143; *Reyer* v. *Blaisdell*, 26 Colo. App. 387, 143 Pac. 385; *Peat Fuel Co.* v. *Tuck*, 53 Cal. 304.) *Adams* v. *Clark*, *supra*, did not involve construction of a statute similar to ours.

Donnelly v. *Strueven*, *supra*, was an action upon a contract for the sale of certain hides, which hides the defendant refused to receive, or to pay for the same, and for plaintiff's damages. The objection made was that plaintiff's action was in tort, and not in contract, but the court in a brief opinion merely holds that the action was one in contract. The question involved in this case is not in any way discussed.

Meyer v. *Brooks* and *Gutta-Percha Rubber Co.* v. *Mayor*, *supra*, were actions based upon judgments of foreign states, and in each an attachment was issued. In each case the court holds that an action upon a judgment will support an attachment, whether the original cause of action was upon contract or tort. The provisions of the Oregon statute, similar to our own above referred to, are mentioned in the decision of that court, but not discussed.

In *Walker* v. *McCusker*, 65 Cal. 360, 4 Pac. 206, the cause of action was for the recovery from defendant as tenant in possession of real estate, purchased by plaintiff on decree of foreclosure and sale, of the value of the use and occupation from the day of sale to the date of sheriff's deed. An attachment was issued, which the trial court refused to dissolve. The statutes of California contain a provision that the purchaser, from the time of sale, is entitled to receive from the tenant in possession the rent of the property sold, or the value of the use and occupation. The court said: "The liability of the tenant in possession to the purchaser for rents or use and occupation from the day of sale to the expiration of the time for redemption is a statutory liability merely, and exists without the assent of the person in possession. It is not a liability founded on a

contract express or implied, within the meaning of section 537 of the Code of Civil Procedure, authorizing the issuance of an attachment."

In *Baldwin* v. *Napa Wine Co.*, 137 Cal. 646, 70 Pac. 732, plaintiff sued upon two causes of action, in the first of which he alleged that defendant failed and refused to take or pay for certain wines, as agreed upon in a certain contract between the parties. The second cause of action is for damages alleged to have been sustained by reason of defendant's failure to "push" the sales of wines, as provided in the contract, or to sell the number provided for therein. The court reaffirmed the holding in *Hathaway* v. *Davis, supra,* as to attachment for unliquidated damages.

In *Ancient Order of Hibernians, etc.,* v. *Sparrow,* 29 Mont. 132, 101 Am. St. Rep. 563, 1 Ann. Cas. 144, 64 L. R. A. 128, 74 Pac. 197, this court, speaking through Mr. Justice Holloway, held that an action against sureties on a bond conditioned to be void if the principal performed his contract is not an action on a contract for the direct payment of money, authorizing an attachment, and refused to follow the holding in *Hathaway* v. *Davis, supra,* upon that subject, though in the later case of *American Surety Co.* v. *Kartowitz,* 54 Mont. 92, 166 Pac. 685, the court approved a portion of the holding in the *Hathaway Case.*

The term "direct payment of money" is a term found in the statutes of but few states, and those, apparently, only Montana, Oregon, Idaho and California, and at one time Colorado, and even in those states there are provisions in their attachment laws not found in ours, under which provisions many of the decisions in those states are founded. As said in the *Hathaway Case,* whoever attempts to define the term "will first come to the conclusion that the legislature has expressed its will in language not a little obscure."

In the *Sparrow Case,* Mr. Justice Holloway, after discussing the decisions of other courts, said: "One of the definitions

given in Webster's Dictionary for the word 'direct' is, 'immediate; express; unambiguous; confessed; absolute'; and it does seem that, if the term is to be given any meaning, as used in our attachment statute, it must distinguish a particular class of contracts for the payment of money from all other contracts for the payment of money. In other words, that class of contracts which provide for the direct payment of money must differ somewhat from all other contracts for the payment of money, or the term 'direct' has no meaning whatever.

"The term first appeared in our attachment statute in 1866. (Act Third Leg. Assem., approved Dec. 3, 1866, p. 62, Chap. 12, sec. 1.) These legislative enactments were annulled by act of Congress. (14 Stats. at Large, 427.) Practically the same provision was re-enacted by the fourth legislative assembly (Laws of 1867, p. 156). This Act was amended by Act of fifth legislative session, approved January 15, 1869 (Laws 1869, p. 64), and the word 'direct' omitted, and it does not reappear until 1895, when its re-enactment into our laws must be presumed to have been done for a purpose, *viz.*, to limit the operation of the writ of attachment. Before 1895 an attachment could be had in every action upon a contract, express or implied, for the payment of money, where the debt was not secured. Since then the writ can only issue in those cases arising on contracts, express or implied, for the direct payment of money, and, applying the definitions of the term 'direct' as given above, the obvious intention of the legislature can be made plain. The contracts now contemplated by section 890, above, are such only as require the payment unconditionally and absolutely of a definite sum." (See, also, *Kyle* v. *Chester*, 42 Mont. 522, 37 L. R. A. (n. s.) 230, 113 Pac. 749.)

The cause of action alleged in the complaint is not one in *assumpsit*, of the nature of those contained in the foregoing citations, but is one based upon a breach of contract, for resultant damages, unliquidated, uncertain in amount, conditional, not assented to by defendant, founded upon conditions which may not have been in the minds of the parties, and which

are not of the kind included within the term "for the direct payment of money."

The order appealed from is affirmed.

Affirmed.

ASSOCIATE JUSTICES HOLLOWAY, MATTHEWS and COOPER concur.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

STATE EX REL. NELSON, RELATOR, *v.* TIMMONS ET AL., RESPONDENTS.

(No. 4,628.)

(Submitted April 27, 1920. Decided May 4, 1920.)

[189 Pac. 871.]

Injunction—Counties—Indebtedness—Special Elections—Notice—Board of County Commissioners—Powers—When Nondelegable.

Injunction— Counties — Indebtedness—Special Election — Notice — Sufficiency.

1. A special election called under the provisions of Chapter 8, Extra. Session, Laws of 1919, to determine whether indebtedness should be incurred by a county to aid drought sufferers, *held* on application for injunction, not to have been invalidated by failure to post the required notice in certain precincts owing to the interruption of the mail and impassability of the roads caused by a storm, where the electors had been advised of the election through the medium of newspapers, where fraud was not charged, the number of electors voting greatly exceeding the number of votes cast at a preceding election held for the same purpose at which the proposition was defeated, and in view of the provision of the Act that failure to give notice should not invalidate an election if there was a substantial compliance with the requirements of the statute in other respects.

County Commissioners—Powers—When Nondelegable.

2. Powers involving the exercise of judgment and discretion on the part of the board of county commissioners are nondelegable.

Same—Drought Relief—Illegal Delegation of Powers.

3. *Held*, that Chapter 8, Laws of Extra. Session of 1919, contemplates that the active management of the fund created by a bond issue for the relief of drought sufferers, shall be confided to the judg-

ment and discretion of the board of county commissioners, and that therefore, under the rule above, a plan whereby purchases of seed and supplies were to be made by the applicant for relief, instead of by the board, the applicant to determine the quality and price thereof, was a departure from the mode prescribed by the Act and not permissible.

Original application by the State of Montana, on the relation of N. L. Nelson, for an injunction against J. C. Timmons and others, constituting the Board of County Commissioners, and A. A. Major, Clerk, of Sheridan County. Injunction granted.

Messrs. Babcock & Ellery, for Relator, submitted a brief, and argued the cause orally.

Mr. S. C. Ford, Attorney General, *Mr. Frank Woody*, Assistant Attorney General, and *Mr. J. J. Gunther*, for Respondents, submitted a brief; *Mr. Woody* argued the cause orally.

Opinion—PER CURIAM.

In this proceeding, which was commenced originally in this court, the relator asks for an injunction against the board of county commissioners and the county clerk of Sheridan county, Montana, restraining them from further proceedings in connection with an election held in that county under the provisions of Chapter 8 passed by the Extraordinary Session of the Sixteenth Legislative Assembly. The complaint embraces two causes of action, the first of which, after omitting formal parts, alleges that pursuant to petitions duly filed, the said board of county commissioners decided to submit to the people of said county, at an election to be held on the twenty-fifth day of March of this year, the question of incurring an indebtedness in a sum not exceeding $400,000, to be used as provided in the said Act referred to. It is conceded that all steps, including [1] the calling of the election, were in due form; but it is alleged that in certain precincts of said county no notices were posted to the effect that such election would be held, and that in other precincts thereof notices, which were posted, were not posted for the statutory period, and that at said election 2,461

votes were cast upon the proposition submitted to the electors, and 1,512 votes were cast in favor of incurring the indebtedness and 949 against the same.

For a second cause of action it is alleged that pursuant to the vote of the electors of said county at said special election, the board is planning and arranging to put said relief measure in force and effect by issuing orders for relief to persons entitled to receive the same, and to allow such persons to secure from any person having seed, provisions or other supplies for sale, relief to the extent of the kind and quality and within the value named in said order, the person filling and acting upon such order to take from the relief applicant having such order filed a written receipt, showing the delivery to such applicant of the kind and quantities of grain, feed, *etc.*, shown upon such order, the receipt so given to be attached to the order for such grain, provisions, *etc.*, which the applicant is then to be required to surrender to the person furnishing such supplies, and such order with the receipt attached is to be forwarded by such person to the clerk of said board of county commissioners, whereupon the said board will cause to be issued a county warrant drawn upon said relief fund for the amount due for such seed grain or provisions.

It is further alleged that by reason of the failure to give the notices above referred to, the election is void, and that the manner in which the commissioners expect to proceed in handling the funds derived from the issuance of warrants or the sale of bonds issued by reason of such election is in contravention of the terms of the Act under which such indebtedness is incurred. There are other allegations to the effect that the relator is an elector, a taxpayer, and has no plain, speedy, or adequate remedy, *etc.*

The respondents, answering the first cause of action in such complaint, alleged that on the third day of January of this year a special election was held in said county under the provisions of said Act, for the purpose of incurring an indebtedness not to exceed $200,000, at which election 1,662 votes were

cast, and that the proposition submitted to the people was defeated, and that later the proceedings now under attack were instituted; that notices were properly mailed to the different precinct officials of said county, but that, by reason of a storm prevailing therein at said time, mail service was interrupted, and the operation of trains leading through said county was suspended, roads were impassable, and that this condition prevailed for several days; and that by reason thereof such copies of proclamation or notice did not reach the judges in time to be posted for the statutory period, and in some precincts did not reach them in time to be posted at all. It is further alleged, however, that in each paper of the county was published a copy of the election proclamation for two successive weeks immediately preceding said election, and that the subject matter of said election and the merits of the proposition proposed to be submitted to the voters were fully and thoroughly discussed by said newspapers, and that said matter was a subject for discussion of the inhabitants and voters of said county generally, and that the voters and public were on the day of said election, and for a long time prior thereto had been, informed of the intention to hold said election and of the fact that said election was called for said day.

There is inserted in the answer a table showing the number of persons registered in the different precincts affected and the number of votes cast at said election, and the statement is made that all persons who desired to do so did vote; that no persons were deprived of their right to vote by reason of the failure to post such proclamation or notice, and that all persons who failed to vote at said election refrained from indifference as to the result or from their willingness that the proposition submitted should be adopted and relief granted under the provisions of said law.

The respondents demurred to the second cause of action stated in the complaint. Thereupon the relator demurred to the respondents' answer above referred to, and the cause is submitted to this court upon the pleadings.

1. The question of notice as considered in the statute referring to elections under the provisions of Chapter 8, *supra*, is largely determined by section 31 thereof, which reads as follows: "This Act, and all of its provisions shall be liberally construed so as to effectuate its purpose, and a failure to give any of the notices herein provided for, or to perform any of the acts herein required, within the exact time prescribed shall not invalidate any election held hereunder, or any warrants or bonds issued, provided there has been a substantial compliance with the provisions of this Act except as to time."

It is urged that the last clause of the section, "provided there has been a substantial compliance with the provisions of this Act *except as to time*," renders the failure to strictly comply with all the statutory provisions as to notice sufficient to invalidate the election. We think this clause, taken in connection with the wording of the section, simply means that "A failure to give any of the notices herein required within the exact time prescribed, shall not invalidate any election, * * * provided there has been a substantial compliance with the provisions of this Act *in other respects*."

The effect of lack of notice was fully discussed by this court in *State ex rel. Patterson* v. *Lentz*, 50 Mont. 322, 146 Pac. 932, *Wright* v. *Flynn*, 55 Mont. 61, 173 Pac. 421, and *Leary* v. *Young*, 55 Mont. 275, 176 Pac. 36, and we see no reason for disaffirming the reasoning of those cases. It may well be that the statute with regard to notice should be more strictly followed in the matter of special elections than in those pertaining to general elections of which the voters are presumed to have notice; but here it appears that notice was actually published in newspapers throughout the county, and that in the precincts where no notice or insufficient notice was posted, a large number of voters actually voted. It also appears from the answer that at an earlier election held for the same purpose a much smaller number of voters exercised their franchise upon the subject in many of the precincts where insufficient notice

was given than did at the election now attached. It further appears from the answer that there was much discussion of the election in the newspapers of the county, and general knowledge and discussion of the same among the people of the county, and that all persons who desired to do so did vote, and that none were prevented from voting. There is no allegation of fraud, and the determination of the question is addressed solely to the failure to strictly follow the statute as to the posting of notice.

The statute itself, having provided that "a failure to give any of the notices herein provided for or to perform any of the acts herein required, *etc.*, shall not invalidate any election held hereunder," precludes the court from holding the election void, where it affirmatively appears from the pleadings that no fraudulent advantage has been taken or obtained, and that all who desired to do so did vote, and that the election has been conducted fairly. To hold to the contrary would be to set at naught the provisions of the Act itself.

We think, on the record as made, the election was legally held. The first cause of action is dismissed.

2. It is apparent at once that by this plan the county is [2, 3] purchasing the supplies only indirectly; that the purchases are made at retail; that the determination of the price to be paid and the quality of the goods to be purchased is referred to the judgment and discretion of the applicant, and that if the demand for relief exceeds the amount the board can supply, some applicants will receive relief to the full extent of their needs, while others will be denied any relief whatever. However convenient the plan may appear to be, and however much its operation may relieve the board of trouble and responsibility, it violates the spirit and letter of the law and cannot be approved.

Section 11 of the Act provides that the board shall purchase the supplies and furnish them "in the manner hereinafter provided."

Section 12 provides that the board shall purchase at the lowest price obtainable and in such amounts as may be required from time to time.

Section 26 provides: "If more relief is applied for than can be supplied by the board of county commissioners of any county under the provisions of this act a *pro rata* distribution shall be made among those who shall be found entitled to the benefits of this Act. * * * All relief shall be furnished at actual cost, including transportation and handling charges."

From the Act in its entirety the legislative intent is made apparent. It was the purpose of the lawmakers to confide to the judgment and discretion of the board the active management of the relief measure, to the end that the public interest should be promoted by the expenditure of the money voted, in the most advantageous manner. The statute imposes upon the board, and not upon the applicant, the duty to exercise judgment as to the kind and quantity of provisions to be furnished, the price to be paid, and the apportionment of the funds among those entitled to relief; and it is elementary that under such circumstances the authority cannot be delegated. The general rule is stated in 15 Corpus Juris, 465, as follows: "The right of a county board to delegate its authority depends on the nature of the duty to be performed. Powers involving the exercise of judgment and discretion are in the nature of public trusts and cannot be delegated to a committee or agent." The authorities supporting the text will be found cited in the notes, and need not be given here in detail.

The plan contemplated by the board undertakes to confer upon the applicant for relief the authority to make the purchases, determine the quality and price, and bind the county by his judgment.

Counsel for respondents direct our attention to the following rule announced by this court in *Morse* v. *Granite County*, 44 Mont. 78, 119 Pac. 286: "If, however, there is no question of the existence of the power to do the act proposed, the board is left free to use its own discretion in selecting the mode it

shall adopt or the course it shall pursue, and the result cannot be called in question if the course pursued is reasonably well adapted to the accomplishment of the end proposed." In this instance, however, the mode of procedure is pointed out by the statute, and the board is limited accordingly. In the *Morse Case* it is said: The board "is a body of limited powers and must in every instance justify its action by reference to the provisions of law defining and limiting these powers." (See, also, *Edwards* v. *Lewis & Clark County*, 53 Mont. 359, 165 Pac. 297.)

In adopting and assuming to put into operation the plan referred to, the board has departed, and is departing, from the mode prescribed by the statute.

The demurrer to the second cause of action is overruled, and an injunction will issue, restraining the board and clerk from proceeding further with such plan.

Injunction granted.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

MEMORANDA

OF

DECISIONS RENDERED WITHOUT EXTENDED OPINIONS DURING THE PERIOD EMBRACED IN THIS VOLUME.

No. 4,515.—STATE EX REL. NICHOLAS M. GOLUBIN, RESPONDENT, *v.* WILLIAM T. STODDEN, AS MAYOR OF THE CITY OF BUTTE, APPELLANT.

Appeal from District Court, Silver Bow County; Edwin M. Lamb, Judge.

Decided December 23, 1919.

PER CURIAM.—Pursuant to stipulation of the parties, the appeal in the above-entitled cause is dismissed.

Mr. R. L. Clinton and *Mr. C. F. Juttner*, for Appellant.

Mr. T. F. O'Connell and *Mr. Geo. D. Toole*, for Respondent.

No. 4,295.—MIDLAND COAL CO. ET AL., RESPONDENTS, *v.* CITY OF MILES CITY, APPELLANT.

Appeal from District Court, Custer County; C. C. Hurley, Judge.

Decided December 23, 1919.

PER CURIAM.—Upon motion of the appellant, the appeal herein is dismissed.

Mr. Geo. W. Farr and *Mr. H. E. Herrick*, for Appellant.

Mr. C. A. Spaulding, for Respondent.

No. 4,544.—STATE EX REL. MONTANA OIL CO., RELATOR, *v.* DISTRICT COURT ET AL., RESPONDENTS.

Original application for writ of supervisory control to the District Court of the Eleventh Judicial District in and for the County of Flathead, and T. A. Thompson, Judge thereof.

Decided January 5, 1920.

PER CURIAM.—The application herein for writ of supervisory control is denied.

Mr. J. A. Walsh, for Relator.

No. 4,545.—FRANCISKA VESEL, RESPONDENT, *v.* GEO. BRDAR ET AL., APPELLANTS.

Appeal from District Court, Musselshell County.

Decided January 16, 1920.

PER CURIAM.—Upon motion of respondent herein, and for good cause shown, the appeal in the above-entitled cause is dismissed.

Messrs. Jeffries & McNaught, for Appellants.

Mr. V. D. Dusenbery and *Mr. W. A. Pennington*, for Respondent.

No. 4,558.—STATE EX REL. GEO. DRYER, RELATOR, *v.* DISTRICT COURT ET AL., RESPONDENTS.

Original application for writ of supervisory control to the District Court of the Fourth Judicial District, and Asa L. Duncan, a Judge thereof.

Decided January 23, 1920.

PER CURIAM.—The application of the relator herein for a writ of supervisory control, this day presented, is denied.

Messrs. Hall & Pope, for Relator.

No. 4,552.—STATE, RESPONDENT, *v.* GEO. F. COLTER ET AL., APPELLANTS.

Appeal from District Court of Hill County.

Decided January 26, 1920.

PER CURIAM.—Upon motion of respondent, the appeal in this cause is dismissed.

Mr. S. C. Ford, Attorney General, and *Mr. A. A. Grorud*, Assistant Attorney General, for Respondent.

No. 4,564.—GREAT NORTHERN RAILWAY CO., RESPONDENT, *v.* HILL COUNTY ET AL., APPELLANTS.

Appeal from District Court, Hill County.

Decided February 9, 1920.

PER CURIAM.—Pursuant to motion of appellants, the appeal in the above-entitled cause is dismissed.

Mr. S. C. Ford, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for Appellants.

No. 4,548.—GLADYS M. McCRACKEN, RESPONDENT, *v.* JOSEPH D. McCRACKEN, APPELLANT.

Appeal from District Court, Pondera County; John J. Greene, Judge.

Decided March 8, 1920.

PER CURIAM.—Pursuant to stipulation of the parties herein, the appeal in the above-entitled cause is dismissed.

Messrs. Peters & Smith, for Appellant.

Mr. R. M. Hattersley and *Mr. Stephen J. Cowley*, for Respondent.

No. 4,410.—WILLIAM T. WALLACE, RESPONDENT, *v.* NORTHERN PACIFIC RAILWAY CO., APPELLANT.

Appeal from District Court, Missoula County; Asa L. Duncan, Judge.

Decided March 22, 1920.

PER CURIAM.—Pursuant to stipulation of the parties hereto, the appeal in the above-entitled cause is dismissed.

Messrs. Gunn, Rasch & Hall, and *Mr. William Wayne*, for Appellant.

Messrs. Patterson & Heyfron, for Respondent.

No. 4,610.—STATE EX REL. G. E. LA FOLLETTE, RELATOR, *v.* CHAS. T. STEWART, AS SECRETARY OF STATE, RESPONDENT.

Original application for writ of mandate to respondent, as Secretary of State of the State of Montana.

Decided April 13, 1920.

PER CURIAM.—Relator's application for writ of mandate herein is, after due consideration by the court, denied.

Mr. C. A. Spaulding, for Relator.

No. 4,587.—BUTTE ELECTRIC SUPPLY CO., RESPONDENT, *v.* ROYAL INDEMNITY CO., APPELLANT.

Appeal from District Court, Silver Bow County; John V. Dwyer, Judge.

Decided April 22, 1920.

PER CURIAM.—Pursuant to motion of appellant to dismiss the appeal herein, without prejudice, the appeal is dismissed.

Messrs. O'Flynn & O'Flynn, for Appellant.

Mr. Henry C. Levinski, for Respondent.

No. 4,608.—FALLON COUNTY ET AL., RESPONDENTS, *v.* L. A. THOMPSON, ADMR., APPELLANT.

Appeal from District Court, Fallon County.

Decided April 26, 1920.

PER CURIAM.—Upon motion of respondents herein, the appeal in the above-entitled cause is dismissed.

Mr. P. C. Cornish, for Respondents.

No. 4,617.—SECURITY STATE BANK OF OUTLOOK, RESPONDENT, *v.* JAMES W. McGUIRE ET AL., APPELLANTS.

Appeal from District Court, Sheridan County.

Decided April 26, 1920.

PER CURIAM.—Upon motion of respondent, the appeal in this cause is hereby dismissed, Mr. Justice Hurly, deeming himself disqualified, taking no part in the foregoing order.

Mr. C. J. Cure and *Messrs. Babcock & Ellery*, for Appellants.

No. 4,627.—STATE EX REL. JAMES M. CROFT, RELATOR, *v.* B. F. MOULTON ET AL., RESPONDENTS.

Original application for writ of mandate to respondents, constituting the Board of County Commissioners of Fergus County.

Decided April 28, 1920.

PER CURIAM.—The application of relator for an alternative writ of mandate herein is denied.

Messrs. Walsh, Nolan & Scallon and *Messrs. Worden & Grant*, for Relator.

No. 4,630.—STATE EX REL. CARL BULL, RELATOR, *v.* BOARD OF COUNTY COMMISSIONERS ET AL., RESPONDENTS.

Original application for writ of injunction running to the Board of County Commissioners of Sheridan County and another.

Decided April 30, 1920.

PER CURIAM.—The application for an injunction herein, this day presented to the court, is, after due consideration, denied.

Messrs. Galen & Mettler and *Mr. Alfred T. Vollum*, for Relator.

No. 4,605.—BARBARA NULL DAVEY, RESPONDENT, *v.* ALBERT DAVEY, APPELLANT.

Appeal from District Court, Sheridan County; C. E. Comer, Judge.

Decided May 3, 1920.

PER CURIAM.—Pursuant to motion of respondent herein, and for good cause shown, the appeal is dismissed.

Messrs. Babcock & Ellery, for Appellant.

Mr. J. J. Gunther and *Mr. Geo. Cudhie*, for Respondent.

No. 4,622.—STATE, RESPONDENT, *v.* IRA A. KELSEY, APPELLANT.

Appeal from District Court, Stillwater County; Albert P. Stark, Judge.

Decided May 3, 1920.

PER CURIAM.—Pursuant to motion of the respondent herein, the appeal in this cause is dismissed.

Mr. S. C. Ford, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for Respondent.

No. 4,223.—IN RE ESTATE OF USSIN BRICE.

Appeal from District Court, Broadwater County; John A. Matthews, Judge.

Decided May 4, 1920.

PER CURIAM.—Pursuant to stipulation of the parties the appeal in the above-entitled cause is this day dismissed, costs not to be taxed against either party.

Mr. Henry C. Smith, for Appellant.

Mr. E. H. Goodman and *Messrs. Purcell & Horsky*, for Respondent.

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2. Unless counsel in appellant's brief points out in what respect there was error in refusing an offered instruction and wherein appellant suffered prejudice by the alleged error, the assignment will be disregarded.—Hansen v. Pock 51.

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3. A motion to reopen a case after closing of the testimony and settlement of the instructions, for the purpose of offering a writing in evidence, is addressed to the sound legal discretion of the trial court.—Brange v. Bowen, 77.

New Trial—Insufficiency of Evidence—Discretion.

4. A motion for a new trial on the ground of insufficiency of the evidence is addressed to the sound legal discretion of the trial court, not to be disturbed on appeal except for a clear abuse thereof.—Brange v. Bowen, 77.

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5. The findings of the district court in equity cases will never be reversed, except where the evidence clearly preponderates against them.—Bosanatz v. Ostronich, 197.

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6. From a ruling prejudicial to respondent, appellant cannot complain.—Gervais v. Rolfe, 209.

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7. Where a transcript of the stenographer's notes of the evidence, not made a part of a bill of exceptions, is sought to be made available on appeal under the provisions of Chapter 149, Laws of 1915, it must be certified as correct by the trial court or agreed by counsel to be so; otherwise it cannot be considered by the supreme court for any purpose.—Sprinkle v. Anderson, 219.

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9. For errors in instructions not affecting appellant's substantial rights, a judgment will not be reversed.—Surman v. Cruse, 253.

Probate Proceedings—Executors and Administrators—Settlement of Accounts—Record on Appeal.

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Same—Record on Appeal.

11. Errors in former accounts of an executor are not open for review on appeal from an order settling a subsequent one; hence matters pertaining to them are not properly a part of the record.—In re Estate of Murphy, 273.

Same—Appeal—"Party Aggrieved."

12. A son and heir at law who was pecuniarily and materially affected by a decree settling the final account of the executor and distributing the estate was a "party aggrieved" by, or a person interested in, the decree, within the meaning of the statute allowing an appeal to such person in probate matters.—In re Estate of Murphy, 273.

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13. An heir who permitted the will of his father to be probated without contest, accounts of the executor settled and allowed, and partial distribution of the assets made without timely objection or appeal, was foreclosed from attacking such proceedings on appeal from an order settling the final account of the executor and making final distribution.—In re Estate of Murphy, 273.

Supreme Court—Appellate Jurisdiction.

14. The supreme court has appellate jurisdiction only, except as to those matters over which original jurisdiction is expressly conferred, and will therefore not consider any question on appeal in a civil case not raised in the trial court.—In re Estate of Murphy, 273.

Appeal—Rehearing—What will not be Considered.

15. On petition for rehearing, the supreme court will not consider grounds not presented on the original hearing. (On Motion for Rehearing.)—In re Estate of Murphy, 273.

Probate Proceedings—Confirming Action of Executor—Harmless Error.

16. *Held*, that the action of the district court confirming that of an executor in turning property of the estate in his charge over to testamentary trustees without first obtaining an order of distribution, was harmless, it appearing that the executor reported his action to the court, which thereafter approved it.—In re Estate of Murphy, 273.

Criminal Law—Information—Election—Failure to Make Motion.

17. Where defendant charged with sedition made no motion to compel the state to make an election between a number of offenses charged in the information, and did not seek to have any of the charges withdrawn from consideration, he could not on appeal raise the question whether proof of one offense as to which witnesses were introduced constituted an election.—State v. Smith, 349.

Equity—Findings—Conclusiveness.

18. In equity cases, the findings of the trial court will not be disturbed on appeal, unless the evidence clearly preponderates against them.—Heilman v. Loughrin, 380.

Nonappealable Orders.

19. An appeal does not lie from an order denying a motion for judgment on the pleadings.—Union Bank & Trust Co. v. Himmelbauer, 438.

Evidence—Question Unanswered—Effect.

20. Where a question asked a witness remained unanswered, the position of the objecting party was the same as though his objection had been sustained, and he was therefore not entitled to complain on appeal.—State v. Prlja, 461.

Criminal Law—Technical Errors.

21. Under Revised Codes, section 9415, the supreme court will not reverse a judgment of conviction on account of technical errors or defects in the information where defendant was fully advised of the nature of the charge against him to enable him to prepare to meet that charge, and his substantial rights were not affected by the defect.—State v. Wehr, 469.

Same—Depriving Defendant of Substantial Right—Reversal of Judgment.

22. Whenever it is made to appear in a criminal prosecution that a substantial right has been denied to a defendant, his conviction will not be upheld on appeal.—State v. Brooks, 480.

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When Writ Does not Lie.

1. Attachment does not lie in an action by the buyer of hay at an agreed price per ton, to recover damages from the seller because of the inferior quality of the hay delivered, the action not being one upon a contract for the direct payment of money and hence not falling within the class of cases in which, under section 6656, Revised Codes, attachment may issue.—Beartooth Stock Co. v. Grosscup, 595.

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Claim against estate of client—Right of attorney to testify,—see Estates of Deceased Persons, 1.

Effect of failure to indorse name of plaintiff's attorney on summons,—see Summons, 1, 2.

Attorneys—Disbarment—Sale of Intoxicating Liquor—Conviction.

1. C., an attorney and counselor at law, was charged with conducting a place where intoxicating liquors were sold in violation of law; he pleaded guilty and was sentenced to pay a fine. Charged with conduct justifying his disbarment, he made neither appearance nor answer. *Held*, upon the record of his conviction that he was unfit to be a member of the bar, and his name ordered stricken from the rolls.—In re Callicotte, 297.

Same—Revocation of License—War—Lack of Patriotism—Suspension.

2. Suspension of an attorney to whose continuation in office objections were made after admission, upon the ground that he did not possess that high sense of patriotic duty and love of country during the war which is indispensable to the composition of a thoroughly American citizen, for the term of eight months, with leave to apply for reinstatement upon a satisfactory showing of a good moral character, *held* sufficient punishment in view of applicant's youth, inexperience and immaturity of mind.—In re Sullivan, 592.

Referees—Findings—When Conclusive.

3. Where the evidence in a proceeding looking to the revocation of an attorney's license because of lack of moral qualifications, is conflicting, the referee's findings will be adopted.—In re Sullivan, 592.

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Where evidence not part of—How made part of record,—see Appeal and Error, 7.

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See, also, Mortgages, 1, 2.

Promissory Note Payable to Order—Assignment Without Indorsement—Effect.

1. Where a negotiable instrument made payable to order is transferred without indorsement, its negotiable character is destroyed and the assignee takes it subject to all such defenses as might have been available against it in the hands of the payee.—First National Bank of New Castle v. Grow, 376.

Same—Negotiability—Complaint—Insufficiency.

2. *Held*, that the complaint in an action on a promissory note made payable to order, which specifically alleged that the payee "sold, assigned and transferred" it to plaintiff, disclosed an assignment, and that the general succeeding allegation that plaintiff "is now the lawful owner and holder" thereof, was insufficient to supply the averment that the transfer was had by indorsement. First National Bank of New Castle v. Grow, 376.

Failure of Consideration—Evidence—Judgment-roll in Other Action.

3. In an action on a promissory note, a judgment-roll showing the cancellation of a contract for the sale of land and recovery of the premises by the seller was evidence of failure of consideration for the note given in payment, and if a bank suing on the note took it with knowledge of the failure of consideration, and held it subject to the defense set up, admission of the roll in evidence was proper.—First National Bank of Lewistown v. Wilson, 384.

Purchaser in Good Faith.

4. Where a bank receives a negotiable promissory note before maturity as collateral security for a pre-existing debt, it is, to the extent of its claim, a purchaser in good faith and not affected by equities between the parties to the instrument of which it has no notice.—First National Bank of Lewistown v. Wilson, 384.

Knowledge of Failure of Consideration—When Purchaser not One in Good Faith.

5. A bank which had been made depositary of escrow papers evidencing a sale of land, the two notes given in payment being made payable at different dates at said bank and the papers to be delivered to the buyer upon payment of the first, and which, though knowing of failure of the first payment and that the seller had the right to declare a forfeiture of the contract, twenty-eight days after its due date accepted the second note as security for a pre-existing debt, was not a purchaser without notice.—First National Bank of Lewistown v. Wilson, 384.

Chattel Mortgages—Promissory Notes—Liability of Person Signing Note but not Mortgage.

6. *Held*, that where a husband and wife delivered at the same time a note and a chattel mortgage securing its payment in order to obtain a loan, the wife doing so with full knowledge of and consent to the entire transaction, she was bound by a stipulation in the mortgage granting the mortgagee the option to accelerate payment of the note whenever it was deemed necessary for the security of the loan, though the instrument did not bear her signature.—Union Bank & Trust Co. v. Himmelbauer, 438.

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Failure to point out in what respect error was committed,—see Appeal and Error, 2.

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Real Property—Contract of Sale—Commissions.

1. Where a real estate broker entered into a contract with a land owner under the terms of which he was made agent "to sell" the latter's property for a commission, he was not entitled

thereto upon the mere production of a buyer who was financially irresponsible, but could insist on payment only when the buyer furnished was ready, willing and able to complete the purchase according to the terms agreed upon.—Wright Land & Investment Co. v. Even, 1.

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Intoxicating Liquors—Searches and Seizures—*Prima Facie* Case.

1. In proceedings under Chapter 143, Laws 1917, the affidavit upon which a search-warrant is issued and the possession of the liquors at the time of their seizure are *prima facie* evidence of the contraband character of the liquors, the burden then resting upon the claimant to show his property right and interest therein and that they were not used, kept or possessed with the intention of violating the prohibition laws.—State v. Nielsen, 137.

Contributory Negligence.

2. *Held*, that the rule that in a personal injury action the burden of pleading and proving contributory negligence on the part of the plaintiff is upon defendant was not changed by the Employers' Liability Act, and that refusal of an offered instruction placing the burden upon plaintiff was proper.—Cornell v. Great Northern Ry. Co., 177.

Election Contest.

3. The certificate of election in the hands of respondent was *prima facie* evidence of his right to the office in contest, and appellant had the burden of proving that respondent received a sufficient number of illegal votes charged by him to have been cast, to change the result. Gervais v. Rolfe, 209.

Trusts—Public Lands.

4. In an action to have the patentee of public lands declared trustee for plaintiff, and to require the execution and delivery of a deed to the property to him, he had the burden of showing such equities in himself as would control the legal title in the hands of defendant.—Hensen v. Merton, 231.

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1. The strict rule of *caveat emptor* does not apply where fraud entered into the transaction.—Koch v. Rhodes, 447.

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1. The writ of review cannot be used to correct errors committed in the exercise of jurisdiction.—State ex rel. Griffiths v. Mayor of City of Butte, 368.

City Council—Removal of Fire Chief—Extent of Review of Order of Removal.

2. On *certiorari* to review an order of the city council removing its chief of the fire department, the court may ascertain whether the charges against accused were or were not supported by the evidence, but cannot determine its preponderance.—State ex rel. Griffiths v. Mayor of City of Butte, 368.

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City Council—Removal of Chief of Fire Department—Charges—Sufficiency.

1. In proceedings before a city council for the removal of the chief of the fire department, the charges need not be stated with the technical accuracy required in a complaint filed in court.—State ex rel. Griffiths v. Mayor of City of Butte, 368.

Same.

2. Charges that the chief of a fire department did not respond promptly to fire-alarms, did not know the location of fire hydrants, was incompetent to direct the fighting of fire, failed to tear down certain buildings as required by state fire marshal, *etc.*, *held* sufficiently definite and certain to advise the accused of the nature of the charges against him and to enable him to prepare his defense.—State ex rel. Griffiths v. Mayor of City of Butte, 368.

Same—Removal of Fire Chief—Extent of Review of Order of Removal.

3. On *certiorari* to review an order of the city council removing its chief of the fire department, the court may ascertain whether the charges against accused were or were not supported by the evidence, but cannot determine its preponderance.—State ex rel. Griffiths v. Mayor of City of Butte, 368.

Same—Removal of Fire Chief—Evidence—Sufficiency.

4. Evidence reviewed and *held* on *certiorari*, to substantially support the charges referred to in paragraph 2 above.—State ex rel. Griffiths v. Mayor of City of Butte, 368.

Special Improvements—Damages—Complaint—Presentation of Claim not Required.

5. Plaintiff, in an action to recover back a special improvement tax paid under protest, need not allege in the complaint that his claim had been presented to the city or town council for allowance before action was commenced, section 29 of Chapter 89, Laws of 1913, under which Act the improvements were made, not contemplating presentation thereof as a condition precedent to his right to maintain the action.—Harvey v. Town of Townsend, 407.

Same—Council—Jurisdiction—How Acquired.

6. To acquire jurisdiction to create a special improvement district and order the proposed improvement, the council must pass a resolution of intention to create the district, give the required notice, and hear and determine protests, if any.—Harvey v. Town of Townsend, 407.

Same—Resolution of Intention—Sufficiency.

7. A resolution passed by the town council reciting the creation of an improvement district and that the resolution should be deemed one of intention to create, and creating it, followed by a description of its boundaries and of the character of the proposed improvements, with an estimate of the cost, *etc.*, and that objections to its creation and the final adoption of the resolution would be heard in a certain place at a given time, *held* to have been in

substantial compliance with statutory provisions.—Harvey v. Town of Townsend, 407.

Same—Notice of Intention—Purpose of Reference to Resolution.

8. The purpose of the reference in the notice which must be given by the council of its intention to create a special improvement district, to the resolution of intention is to designate to interested parties the source of information from which to ascertain the description of the property to be included in the proposed district.—Harvey v. Town of Townsend, 407.

Same—Property Owners Chargeable With Notice of What.

9. Since property owners in a proposed special improvement district are chargeable with knowledge that the resolution of intention to create a special improvement district is required to be on file in the town clerk's office and to contain a particular description of its boundaries, failure of the notice mentioned above to refer to the resolution for a description of such boundaries is insufficient to vitiate the proceedings.—Harvey v. Town of Townsend, 407.

Same—Date of Hearing Objections—Statutory Provision Directory.

10. The provision of section 5, Chapter 89, Laws of 1913, that objections to a proposed special improvement shall be heard at the next regular meeting of the city council after the expiration of the fifteen days in which protest can be made, *etc.*, is directory only. Harvey v. Town of Townsend, 407.

Same—Adjournment of Hearing—Estoppel.

11. A property owner whose right to protest against the creation of a special improvement district was foreclosed by failure to act within the fifteen days prescribed by the statute could not complain that the council, instead of hearing the protest at the first regular meeting after expiration of the time fixed, heard it at a later date. Harvey v. Town of Townsend, 407.

Same—Overruling of Protests—What Sufficient Evidence.

12. Where the record showed a protest to a proposed special improvement, and that after hearing it the resolution was passed and approved by the mayor, the action of the council was sufficient evidence that the protest was overruled.—Harvey v. Town of Townsend, 407.

Same—What is Competent Evidence of Publication of Notice.

13. The affidavit of the publisher of a newspaper that notice of intention to create a special improvement district was published, as well as the papers containing it, are admissible and sufficient evidence to prove publication.—Harvey v. Town of Townsend, 407.

Same—Ordering Improvement—Special Resolution not Required.

14. The passage of the resolution creating a special improvement district constitutes a sufficient order for the making of the contemplated improvements, in the absence of a provision in Chapter 89, Laws of 1913, requiring a special resolution to that effect.—Harvey v. Town of Townsend, 407.

Same—Damages—Waiver.

15. By failure of an objecting property owner to give notice of defects or irregularities in the proceedings to the council within sixty days after the contract for the work is let, he waives all claim for damages, under section 13 of Chapter 89, Laws of 1913.—Harvey v. Town of Townsend, 407.

Same—Limit of Cost Per Lineal Foot—Inapplicability of Statute.

16. *Held*, that the limitation of $1.50 per lineal foot placed upon municipal improvements, by section 2, Chapter 89, Laws of 1913, as

amended by Chapter 142, Laws of 1915, or Chapter 175, Laws of 1919, has no application to street grading, draining, paving or curbing and gutter work.—Reeve v. City of Billings, 552.

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COMMON LAW.

When Rule of Decision in State.

1. The common law of England, so far as not repugnant to or inconsistent with the federal or state Constitution or the laws of this state, is the rule of decision in all the courts of the state.—Jonosky, Admr., v. Northern Pac. Ry. Co., 63.

Railroads—Personal Injuries—Duty Owing to Licensee.

2. Under the common law adopted in this state, in the absence of legislative declaration to the contrary, the owner of premises owes to a licensee no duty as to their condition, save that of not knowingly exposing him to hidden perils or wantonly and willfully causing him harm; the licensee enjoying the license subject to the concomitant perils arising from the owner's use in the ordinary course of business.—Jonosky, Admr., v. Northern Pac. Ry. Co., 63.

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1. The right of trial by jury in the classes of cases in which it existed at the time the state Constitution was adopted remains inviolate and is secured to all; in all other cases the legislature may provide for a trial or hearing without a jury.—State v. Kelly, 123.

Initiative and Referendum—Amendments—Power of Legislature.

2. Laws initiated and enacted by the people may be amended by the legislature the same as Acts passed by it, and the validity of such amendments does not depend upon favorable action by the people on a referendum vote thereon.—State ex rel. Goodman v. Stewart, 144.

Referendum—Emergency—Legislative Declaration not Conclusive.

3. *Held*, that the legislative declaration that an emergency exists and that for that reason a certain Act is necessary for the immediate preservation of the public peace and safety, making the Act nonreferable (Const., Art. V, sec. 1), is not conclusive, the question—backed by facts—whether the Act is of such character being a judicial one determinable by the courts.—State ex rel. Goodman v. Stewart, 144.

Same—Emergency—How Determined.

4. In determining whether an Act is necessary for the immediate preservation of the public peace or safety, and so excepted from the power reserved in the people to have a referendum, courts may consider the face of the Act, the history of the legislation and contemporaneous declarations of the legislature, the evil to be remedied, and the natural or absurd consequences of any particular interpretation.—State ex rel. Goodman v. Stewart, 144.

Same—Meaning of Emergency Clause.

5. *Held*, that the exception embodied in Article V, section 1, of the Constitution, *i. e.*, that Acts necessary for the immediate preservation of the public health, peace or safety shall not be subject to the referendum,—was not intended to extend further than to matters arising out of some unforeseen menace, public calamity, accident, sudden emergency, extraordinary occurrence or unprecedented climatic condition, rendering immediate action imperative to prevent serious or irreparable injury to the public.—State ex rel. Goodman v. Stewart, 144.

Same—Primary Act—Not Proper Subject of Emergency.

6. *Held*, that Chapter 28, Laws of 1919, Extra Session, amending the primary election law, was not necessary for the immediate preservation of the public peace and safety, and therefore not excepted from a referendum. (MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY dissenting.)—State ex rel. Goodman v. Stewart, 144.

Officers—Salaries—Increase—Purpose of Constitutional Limitations.

7. The purpose of the constitutional limitations (Art. V, sec. 31, Art. VII, sec. 4, Art. VIII, sec. 29) against the passage of laws increasing or diminishing the salaries of certain public officers during the terms for which they were elected, is to remove the temptation from the legislature to control the executive and judicial branches of government by promises of reward in the form of increased compensation or threats of punishment by way of reduced salaries.—State ex rel. Jackson v. Porter, 343.

Same—Enforcement of Constitutional Limitations.

8. The rule established by the above constitutional limitations must be strictly enforced, provided the reason underlying it is present; whenever the reason for it ceases, so does the rule itself. State ex rel. Jackson v. Porter, 343.

District Judges—Salaries—Who Entitled to Increase.

9. *Held*, that while under the constitutional limitations above (paragraph 7) a district judge elected prior to, and serving at the time of, the passage of an Act increasing the salary of the office, would not have been entitled to the increase, his successor appointed to fill the vacancy created by the former's resignation some seven months after its passage, could rightfully demand the enlarged compensation, the circumstances removing the case from the operation of the rule referred to in paragraph 7 above. (MR.

CHIEF JUSTICE BRANTLY and MR. JUSTICE HURLY dissenting.)—State ex rel. Jackson v. Porter, 343.

Elections—Referendum Petition—Number of Signatures Required.

10. Under the amendment to section 1 of Article V of the Constitution, a petition for referendum to be effective must be signed by five per cent of all the legal voters of the state, and each of two-fifths of all the counties must furnish as signers five per cent of the legal voters of that county; if then the whole number from those counties does not make the required five per cent, the petition may be rendered effective by a sufficient number of signers from other counties to supply the deficiency.—State ex rel. Gleason v. Stewart, 397.

Same—Referendum—Suspension of Act—Number of Signatures Required.

11. *Held*, on *mandamus*, that where suspension of a legislative Act pending submission thereof to a vote of the people is sought through the medium of a referendum, the petition must be signed by fifteen per cent of the legal voters of a majority of the whole number of counties of the state,—not by fifteen per cent of all the legal voters of the state.—State ex rel. Gleason v. Stewart, 397.

Construction—Rules Applicable.

12. The rules applicable to the construction of statutes are also applicable to the construction of provisions of the Constitution.—State ex rel. Gleason v. Stewart, 397.

Same.

13. In construing a provision of the Constitution (or statute), courts must first ascertain its purpose and intent, taking in its obvious sense the language used, aided by the ordinary rules of grammar; recourse to other rules of construction not being permissible until failure of this method of construction.—State ex rel. Gleason v. Stewart, 397.

Same—County Clerk—Irregularity in Certifying Number of Legal Voters—Effect.

14. A legal voter cannot be prevented from exercising his constitutional privilege of signing a referendum petition looking to the suspension of an Act of the legislature, by a showing that a county clerk had not technically pursued the direction of the statute in ascertaiing the number of legal voters of his county entitled to sign the petition.—State ex rel. Gleason v. Stewart, 397.

New Counties—Expense of Preliminary Proceeding—Unequal Tax Burdens.

15. Failure to make provision for reimbursement of the county from which the greater area for a proposed new county is taken for the expense incident to the creation of the new county, *held* not to render Chapter 226, Laws of 1919, violative of section 11 of Article XII of the Constitution, as casting an unequal burden of taxation upon the old county.—State ex rel. Woodward v. Moulton, 414.

Impartial Jury.

16. The right to trial by an impartial jury, every member of which is impartial, given by the Constitution (Article III, section 16), is an unqualified one, which it is beyond the power of the legislature to curtail, and any provisions of the statutes which relate to the selection of a jury are to be understood as merely

providing the means by which the constitutional guaranty may be exercised to the fullest extent.—State v. Brooks, 480.

Free Speech—Free Press—Constitutional Guaranties.

17. The constitutional guaranty of free speech and free press was not suspended by the war, abuse of the guaranty only being punishable.—State v. Smith, 563.

Limits of Free Speech and Free Press—Power of Legislature.

18. Though the constitutional guaranty of free speech and free press was not suspended by the war, the legislature could properly by Chapter 11, Extra. Session Laws of 1918, define the limits of both by declaring that the use of language calculated to incite or inflame resistance to a duly constituted federal or state authority in connection with the prosecution of the war constituted an abuse of that liberty and a crime against the state.—State v. Smith, 563.

Criminal Law—Place of Crime—Proof—Jurisdiction.

19. Under section 16, Article III, of the Constitution, proof of the charge in the information that defendant published the seditious article mentioned therein, in a certain county, was indispensable to give the district court of such county jurisdiction to try the cause.—State v. Smith, 563.

CONSTITUTION OF MONTANA.

(List of Sections Cited or Commented upon.)

Article III, section 6..... 526
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Article III, section 16.....487, 583
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CONTRACTS.

See, also, Independent Contractors; Insurance, 1.

Admissibility of parol evidence,—see Evidence, 32, 38, 42.

Of carriage of livestock—Ambiguity,—see Railroads, 4–9.

Ambiguity—Interpretation Against Whom.

1. Under section 5043, Revised Codes, ambiguity in the language of a contract must be interpreted most strongly against the party who drew it.—Wright Land & Investment Co. v. Even, 1.

Contract to Sell and Buy—Nature of Transaction.

2. An agreement to sell and buy is preliminary to a sale, resulting in a sale only if the terms thereof are fulfilled.—Wright Land & Investment Co. v. Even, 1.

Construction—Duty of Courts.

3. Courts will not, in the absence of an attack on its validity, interfere with a contract, nor make a new one for the parties.—Pearce v. Metropolitan Life Ins. Co., 79.

Undisclosed Motive or Inducement—Effect on Contract.

4. A motive for entering into a written contract, or an inducing cause in the mind of one of the parties to it, undisclosed to the other, cannot after its execution be read into it as a part of the consideration.—Helena L. & Ry. Co. v. Northern Pac. Ry. Co., 93.

Intent of Parties—When Material.

5. The circumstances under which a contract was made, or the intent of the parties at the time, are only material when the contract is ambiguous in some of its terms.—Helena L. & Ry. Co. v. Northern Pac. Ry. Co., 93.

Lease—Electricity—What Does not Constitute Breach.

6. Where a contract between a railway company and an electric light and power company obligated the latter to deliver to the former such an amount of electric current as the railway company might require at certain points on its line of road, but did not make it obligatory upon the latter company to receive current at each of the points enumerated, the abandonment of the use of electric power at one of such points was not a breach of the contract.—Helena L. & Ry. Co. v. Northern Pac. Ry. Co., 93.

Same—Renewal—Extension—Definition.

7. An option to renew a contract is the right to require the execution of a new one—which does not constitute a present demise: an option to extend is a present demise which operates to extend the term of the original agreement and which then becomes a contract for both the original and extended term.—Helena L. & Ry. Co. v. Northern Pac. Ry. Co., 93.

Construction.

8. In construing provisions of a contract of the nature referred to in paragraph 6 above, which provided, among other things, for its "renewal" in a certain event, courts look the entire agreement and to the practical construction given to it by the parties themselves, rather than to the phraseology used.—Helena L. & Ry. Co. v. Northern Pac. Ry. Co., 93.

Courts will Uphold.

9. If upon a reasonable construction contracts may be upheld, courts will uphold them.—Helena L. & Ry. Co. v. Northern Pac. Ry. Co., 93.

Option to Renew—Nature of Right.

10. An option to renew a contract of lease by giving proper notice prior to the expiration of the term fixed was a substantial right acquired by the lessee as a part of the original contract, and constituted a substantial obligation on the part of the lessor. Helena L. & Ry. Co. v. Northern Pac. Ry. Co., 93.

Renewal—Extension—Nature of Privilege.

11. Defendant railway company was given the right to "renew" a contract with an electric light and power company for light and power for an additional term of five years on giving thirty days' notice before expiration of the first term. The power company had not bound itself to execute a new contract and the railway company did not demand one, but gave the required notice at the proper time. *Held*, that the notice given had the effect of extending the original contract for the additional term, and that

the contract then became one for the original and the extended term—a demise *in praesenti* as of the date of the original contract.—Helena L. & Ry. Co. v. Northern Pac. Ry. Co., 93.

Same—Extends to What Clauses of Contract.

12. A renewal or extension of a contract of the nature of the above, under like provisions, extends the contract with respect to all of its terms and conditions, except the one referring to the extension clause; and hence is not objectionable as creating a perpetuity.—Helena L. & Ry. Co. v. Northern Pac. Ry. Co., 93.

Electricity—Public Utility Act—Effect on Existing Contracts.

13. *Held*, that since section 12 of the Public Utility Act (Chap. 52, Laws of 1913) exempts from the operation of the Act all "existing contracts," and does not exclude from the provisions of the exempting clause renewals or extensions of such contracts, the renewal or extension of the contract referred to in paragraph 11, *supra*, which contract was executed before the passage of the Act and would have expired after it went into effect but for its extension, was not unlawful. (MR. JUSTICE HOLLOWAY dissenting.)—Helena L. & Ry. Co. v. Northern Pac. Ry. Co., 93.

Impairment of Obligation—Constitution.

14. An Act which, in any degree, modifies the obligation of a contract, by attempting to relieve one party from a duty assumed under it, is repugnant to the constitutional prohibition against the impairment of the obligation of contracts.—Helena L. & Ry. Co. v. Northern Pac. Ry. Co., 93.

Attorney and Client—Procuring Pardon—Validity of Contract.

15. Whether a contract to pay for services to be rendered in procuring or attempting to procure a pardon is valid or void, upon the theory that such a contract contemplates interference with the pardoning power, depends upon the character of the services contemplated.—Spaulding v. Maillet, 318.

Same—Public Policy.

16. Contracts between attorney and client for the employment and compensation of the former for his services, form no exception to the rule that contracts which contravene public policy are invalid and cannot be enforced.—Spaulding v. Maillet, 318.

Same—Procuring Pardon—When Contract Valid, When not.

17. If a contract between an attorney and one convicted of crime, to procure the latter's pardon, provides for the rendition of purely professional services, such as the drafting and presentation of a petition, the collection of information regarding the convict, *etc.*, it should be upheld; if, however, it contemplates favorable action through personal influence and solicitation, it should be condemned as contrary to good morals and sound public policy. Spaulding v. Maillet, 318.

Same—Procuring Pardon—Invalidity of Contract.

18. *Held*, that a contract between an attorney and one convicted of the crime of introducing intoxicating liquors on an Indian reservation, under which the former should use his personal influence and friendship with a United States district attorney to secure from the latter a recommendation for the convict's pardon, was void as against public policy, the facts that unlawful means in carrying out the contract were not resorted to nor contemplated and that no injustice resulted to anyone from the execution of the contract being immaterial.—Spaulding v. Maillet, 318.

Public Policy—Construction.

19. Courts are reluctant to declare agreements void as against public policy if by any reasonable construction they can be upheld.—Spaulding v. Maillet, 318.

Rules of Interpretation—When not to be Resorted to.

20. Resort to the rules of interpretation to uphold a contract is not admissible if its meaning is free from doubt.—Spaulding v. Maillet, 318.

Ambiguity—Construction.

21. Consideration of the circumstances surrounding the making of a contract and the probable intent of the parties, may be had only when the agreement is ambiguous in some of its terms.—Spaulding v. Maillet, 318.

Liability of Party Signing One of Several Contracts in Same Transaction.

22. Where two or more contracts are known to all the parties to be parts of the same transaction and are delivered at the same time to accomplish an agreed purpose, the party not signing one of the writings cannot escape liability by asserting that he was not a party to all the contracts.—Union Bank & Trust Co. v. Himmelbauer, 438.

Leases—Ambiguity—Evidence.

23. Where the terms of a lease are ambiguous, the circumstances under which it was made and the intention of the parties in entering into it are proper subjects of inquiry.—Duckett v. Biggs, 443.

Sales—Breach by Buyer—Rights of Seller.

24. Where one party to a contract communicates to the other his refusal to be longer bound thereby, the latter is excused from further performance on his part.—McCaull-Dinsmore Co. v. Jackson, 555.

Same.

25. *Held*, that where a wheat buyer, under a contract which provided that upon delivery of the wheat to the railway company a bill of lading should be issued to the seller, who was to attach a sight draft payable at Duluth, Iowa, unqualifiedly advised the seller, after referring to a threatened railroad strike, that four days thereafter it would cease honoring drafts accompanying bills of lading containing a loss and damage exemption clause, and the seller upon inquiry was informed that no bill of lading would be issued without such clause, he was justified in treating the contract as repudiated and in reselling the wheat.—McCaull-Dinsmore Co. v. Jackson, 555.

Same—Breach by Buyer—Election of Seller to Consider Contract at End—Notice.

26. Where plaintiff, in an action for breach of contract of sale, himself repudiated in advance a material provision thereof, defendant was under no obligation to give notice of his intention to consider the agreement at an end and resell.—McCaull-Dinsmore Co. v. Jackson, 555.

CONVERSION.

Demand for Possession—When Necessary—When not.

1. Demand for possession of personal property wrongfully obtained is not necessary as a condition precedent to the right to maintain an action in conversion; if, however, rightfully obtained, demand and refusal are necessary.—Duckett v. Biggs, 443.

When Demand for Possession and Refusal Necessary.

2. Where by mutual agreement between the lessor of agricultural lands and the lessee grain grown thereon by the latter was stored in the former's granary and mingled with his own, the door locked and kept locked, the lessor was rightfully in possession, and demand by the lessee for the grain and refusal by the lessor were necessary to the maintenance of an action in conversion.—Duckett v. Biggs, 443.

CORPORATIONS.

Interest of stockholders in goodwill,—see Goodwill, 1–4.

Officer charged with publication of seditious article—Defense—Instruction—Proper refusal,—see Criminal Law, 47.

COSTS.

Intoxicating Liquors—Seizure—Costs—How Paid.

1. *Held*, that since Chapter 143, Laws of 1917, does not provide that the costs of the proceeding incident to the seizure of contraband liquors may be taxed against the party claiming them, it is error to so tax them.—State v. Kelly, 123.

Same.

2. *Held*, under section 13 of Chapter 143, above, that if costs are recoverable in a proceeding of the nature of the above, they must be paid by the county from the sale of the property seized, provided any of such property is of the character which may be sold.—State v. Kelly, 123.

Memorandum—When Properly Stricken from Files.

3. Costs are recoverable only by virtue of the statute, and in order to recover them, the party making the claim must comply with its provisions; therefore, failure to file the memorandum required by section 7170, Revised Codes, operates as a waiver and justifies the court in striking the cost bill.—Gervais v. Rolfe, 209.

Election Contest—When Costs not Recoverable.

4. Where contestee in an election contest did not file his memorandum of costs until ten days after the court's findings had been filed, it was properly stricken from the files.—Gervais v. Rolfe, 209.

Witnesses—Mileage and *Per Diem*—Proper Allowance.

5. In the absence of a clear showing of bad faith on the part of the prevailing party in calling a witness, the trial court's action in allowing him mileage and *per diem* will not be interfered with on appeal, the fact that the testimony was immaterial to any issue made by the pleadings not changing the rule.—Spaulding v. Maillet, 318.

Quieting Title—Plaintiff Successful in Part—Costs—Discretion.

6. The disposition of the question of costs in an action to quiet title to two quartz lode mining claims, in which plaintiff prevailed as to one claim and defendants as to the other, *held* to have been within the sound, legal discretion of the trial court (Rev. Codes, sec. 7156), with whose action in allowing costs to plaintiff only the supreme court will not interfere in the absence of a showing of a manifest abuse of such discretion.—Heilman v. Loughrin, 380.

In Justice's Court—Taxable in District Court.

7. *Held*, that sections 7083 and 7124, Revised Codes, impliedly authorize the district court to tax against the unsuccessful party in that court the costs incurred in the trial of the cause in the

justice's court, where they were included in the cost bill, although the justice of the peace had failed to make entry of costs on his docket.—Duckett v. Biggs, 443.

Refusal to Strike—When Proper.

8. Refusal to strike from the cost bill the items "Sheriff's fees in district court, $2.00; in justice court, $6.90," *held* proper as against the contention that they were not set forth with sufficient particularity.—Duckett v. Biggs, 443.

COUNTIES.

See, also, County Clerk; County Commissioners; Sheriffs—Special Deputies.

Officers—Assessors—Special Deputies—Compensation—Board of County Commissioners—Powers.

1. *Held*, that while the board of county commissioners has no power to decrease the compensation of regular deputies of county officers fixed by section 1 of Chapter 222, Laws of 1919, it has discretion, under section 2 thereof, to fix the compensation of extra deputies appointed for temporary service, at any rate it may deem expedient, provided it does not exceed the rate paid the regular deputies.—Modesitt v. Flathead County, 216.

Mandamus—New Counties—Board of County Commissioners—Availability of Writ.

2. *Mandamus* lies to compel the board of commissioners of a county from which the greater portion of a proposed new county is intended to be taken to reconvene and take jurisdiction of the proceeding, where its refusal to proceed was based upon an erroneous decision of purely preliminary questions of law.—State ex rel. Woodward v. Moulton, 414.

New Counties—"Taxpayer"—Definition.

3. A "taxpayer" within the meaning of section 2 of the New Counties Act (Chap. 226, Laws of 1919) which requires petitions for the creation of a new county to be verified by five resident taxpayers, is one who owns property within the county and who pays, or is subject to and liable for, a tax.—State ex rel. Woodward v. Moulton, 414.

Same—Taxpayer—Failure to Place Name on Tax-roll—Effect.

4. Where the owner of personalty listed it and paid taxes thereon, failure of the assessor to place his name on the tax-roll, or the fact that the property was mistakenly assessed in the name of a newspaper of which he was the owner, did not have the effect of disqualifying him as a "taxpayer" as above defined.—State ex rel. Woodward v. Moulton, 414.

Same—Exclusion Petition—"Block"—Insufficiency.

5. *Held*, that the requirement of Chapter 226, Laws of 1919, that territory sought to be excluded from a proposed new county must be in one block—the word "block" implying solidity or compactness—was not met by a petition describing an irregularly shaped tract distributed over fourteen townships, the exterior boundaries of which ran back and forth, in all directions of the compass, alternately including and excluding small tracts, so threaded together as to preserve its continuity, and including those against the creation of the new county and excluding those favoring it.—State ex rel. Woodward v. Moulton, 414.

Same—Exclusion Petition—Majority Rule.

6. The intent of the legislature in enacting the provision that territory sought to be excluded from a proposed new county must be in one block, *held* to have been that a block should be mapped out, irrespective of the personnel of those residing within it, the majority of the residents thereof to determine whether, as a whole and not as individuals, they go with the new or remain in the old county.—State ex rel. Woodward v. Moulton, 414.

Same—Defective Exclusion Petition.

7. Where the territory described in an exclusion petition filed in a proceeding to create a new county left certain tracts in the proposed new county contiguous to the remainder of the old county, but entirely surrounded by exclusion territory and segregated from the remainder of the new county, such tract should have been included in the exclusion petition.—State ex rel. Woodward v. Moulton, 414.

Same—Expense of Preliminary Proceeding—Constitution—Unequal Tax Burdens.

8. Failure to make provision for reimbursement of the county from which the greater area for a proposed new county is taken for the expense incident to the creation of the new county, *held* not to render Chapter 226, Laws of 1919, violative of section 11 of Article XII of the Constitution, as casting an unequal burden of taxation upon the old county.—State ex rel. Woodward v. Moulton, 414.

COUNTY CLERKS.

Duty with reference to certification of number of legal voters on referendum petition,—see Elections, 11, 12.

COUNTY COMMISSIONERS.

County Officers—Assessors—Special Deputies—Compensation.

1. *Held*, that while the board of county commissioners has no power to decrease the compensation of regular deputies of county officers fixed by section 1 of Chapter 222, Laws of 1919, it has discretion, under section 2 thereof, to fix the compensation of extra deputies appointed for temporary service, at any rate it may deem expedient, provided it does not exceed the rate paid the regular deputies.—Modesitt v. Flathead County, 216.

Powers—When Nondelegable.

2. Powers involving the exercise of judgment and discretion on the part of the board of county commissioners are nondelegable.—State ex rel. Nelson v. Timmons, 602.

Drought Relief—Illegal Delegation of Powers.

3. *Held*, that Chapter 8, Laws of Extra. Session of 1919, contemplates that the active management of the fund created by a bond issue for the relief of drought sufferers, shall be confided to the judgment and discretion of the board of county commissioners, and that therefore, under the rule above, a plan whereby purchases of seed and supplies were to be made by the applicant for relief, instead of by the board, the applicant to determine the quality and price thereof, was a departure from the mode prescribed by the Act and not permissible.—State ex rel. Nelson v. Timmons, 602.

CRIMINAL LAW.

See, also, Intoxicating Liquors.

Gaming—Conflicting Evidence—Verdict Conclusive.

1. In a prosecution for permitting a gambling game to be played in defendants' cigar-store, a verdict of guilty, based upon conflicting evidence sufficient to go to the jury, will not be disputed on appeal.—State v. Dumphy, 229.

Same—Size of Stakes Immaterial.

2. Section 8416, Revised Codes, prohibiting gambling, makes no distinction as to the amount of the stakes involved; hence it is immaterial that the stakes were merely treats or cigars.—State v. Dumphy, 229.

Insurance—"Rebating" a Misdemeanor.

3. A fire insurance solicitor who, pursuant to an agreement with an agent of the owner of a business block, paid over to the agent two-thirds of the commission earned by him in writing the insurance upon such block, was guilty of "rebating," an act made a misdemeanor by section 4028, Revised Codes.—Smith v. Kleinschmidt, 237.

Evidence—Cross-examination of Defendant—Waiver of Constitutional Privilege.

4. Where defendant in a criminal prosecution takes the stand as a witness in his own behalf, and testifies that he did not commit the crime imputed to him, he waives his constitutional privilege, and cannot refuse to testify to any facts which would be competent evidence in the case if proved by other witnesses.—State v. Smith, 349.

Same—Cross-examination of Defendant.

5. The general rule that cross-examination must be confined to matters about which the witness has been examined on his direct examination, or matters connected therewith directly or indirectly, *held* controlling where defendant offers himself as a witness, though a wide latitude in the examination is permissible.—State v. Smith, 349.

Same—State Cannot Make Out Case on Cross-examination.

6. Under pretense of cross-examination of a witness of defendant, the state cannot make out its own case.—State v. Smith, 349.

Sedition—Cross-examination of Defendant—Impeachment—When Error.

7. Where, after defendant, charged with sedition, had testified in his own behalf simply denying that he made the utterances testified to by the state's witnesses, the county attorney cross-examined him, in the manner of laying the foundation for impeachment, as to other seditious language not charged in the information nor inquired into in the state's case in chief, he made him his own witness and was bound by his answers, and in thereafter permitting him to be impeached the court committed error.—State v. Smith, 349.

Same—Intent.

8. *Held*, that while intent is not specifically made an element of the crime of sedition as defined by Chapter 11, Laws Ex. Sess. 1918, the legislature inferentially made it such by the use of the word "calculated" when it made language "calculated to incite or influence resistance" to constituted authority a public offense.—State v. Smith, 349.

Same—Effect of Seditious Utterances—Jury Question—Instructions.

9. The question whether the natural tendency and reasonably probable effect of alleged seditious utterances was to incite or inflame resistance to duly constituted federal or state authority in connection

with the prosecution of the war, was a question for the jury, and failure to so charge was error.—State v. Smith, 349.

Same—Rules in Libel Cases not Applicable.

10. Though based upon utterances, as are libel cases, the crime of sedition is not governed by the rules in such cases, in which the jury is the judge of both the law and the fact.—State v. Smith, 349.

Same—Instructions—Settlement—Failure to Make Objections—Effect.

11. Where counsel for defendant on the settlement of the instructions made no objection to those proposed to be given, he adopted the theory of the court, and could not thereafter put it in error by showing that certain of the instructions were erroneous, or by charging improper refusal to give others on an opposite theory.—State v. Smith, 349.

Same—Instructions—Proper Refusal.

12. On a trial for sedition, an instruction that in order to convict the jury must find that the utterances proved were seditious was properly refused.—State v. Smith, 349.

Same—Hearsay Testimony.

13. Testimony of a witness, fixing a date by means of an entry made by his wife in a diary kept by her, was hearsay and incompetent.—State v. Smith, 349.

Same—Information—Separate Offenses.

14. Alleged seditious utterances, if spoken at one time and place, may constitute a single offense, but where spoken at different times and places and made to different persons, each utterance, if it constitutes the crime of sedition, is a separate offense.—State v. Smith, 349.

Same—Information—Election—Appeal and Error.

15. Where defendant charged with sedition made no motion to compel the state to make an election between a number of offenses charged in the information, and did not seek to have any of the charges withdrawn from consideration, he could not on appeal raise the question whether proof of one offense as to which witnesses were introduced constituted an election.—State v. Smith, 349.

Assault—Police Officer Making Arrest—Concealed Weapons Statute—Negativing Exception.

16. Where a police officer's defense in a prosecution for assault was that he struck the prosecuting witness on meeting with resistance while attempting to arrest him for carrying a concealed weapon, it was not necessary for him in his proof to negative the exception contained in the concealed weapon statute as to permit to carry a weapon.—State v. Prlja, 461.

Same—Concealed Weapons—Cross-examination—Harmless Error.

17. Refusal to permit cross-examination of the prosecuting witness as to whether he had a permit to carry a revolver and whether he knew it was against the law to carry one, if error, *held* harmless.—State v. Prlja, 461.

Same—Police Officer Making Arrest—Criminal Liability for Assault.

18. While, under Revised Codes, section 9064, in making a lawful arrest, the officer may use all necessary means to effect the arrest if the person to be arrested either flees or forcibly resists, if he unnecessarily assaults him he is criminally liable for such assault.—State v. Prlja, 461.

Same—Police Officer Carrying Revolver in Courtroom—Evidence.

19. A police officer who carried a gun on his person in the courtroom while on trial for assault was not in a position to complain if

prejudiced by the county attorney's question whether he felt it necessary to there carry the weapon, and the court's failure to rule upon his objection.—State v. Prlja, 461.

Same—Appeal—Trial—Objection to Evidence—Question Unanswered—Effect.

20. Where a question to which appellant made objection remained unanswered, he was in the same position as though his objection had been sustained and not entitled to complain.—State v. Prlja, 461.

Same—New Trial—Newly Discovered Evidence—Insufficient Affidavit.

21. An affidavit of one of defendant's attorneys in support of a motion for a new trial asked because of newly discovered evidence, to the effect that he could not with reasonable diligence have discovered the affidavits of five persons who claimed to have been present at the place where the alleged assault occurred and whose testimony would tend to contradict the state's witnesses or corroborate appellant's version of the affray "and presented same upon the trial," was insufficient to show abuse of the court's discretion in denying the motion.—State v. Prlja, 461.

Information—Demurrer—Waiver—Motion in Arrest.

22. The objection that the information does not state facts constituting a public offense is not waived by failure to demur, but may be raised by motion in arrest of judgment.—State v. Wehr, 469.

Intoxicating Liquors—Sale—Information—"Dispose of"—Sufficiency.

23. *Held*, that an information charging that defendant knowingly, willfully and unlawfully "disposed of" intoxicating liquors was sufficient to state a public offense, though it did not set forth that they were disposed of to some person or entity, the term "disposed of" in connection with the words qualifying it excluding an act which by law is innocent, and importing a disposition of the liquors to some person or entity as fully as does the word "sale."—State v. Wehr, 469.

Appeal—Technical Errors.

24. Under Revised Codes, section 9415, the supreme court will not reverse a judgment of conviction on account of technical errors or defects in the information, where defendant was fully advised of the nature of the charge against him to enable him to prepare to meet that charge, and his substantial rights were not affected by the defect.—State v. Wehr, 469.

Sedition—Reading Information to Jury—Refusal—Error.

25. In a prosecution for sedition for distributing a pamphlet containing statements the nature and probable effect of which was alleged to have been the obstruction of the national draft law, refusal to permit defendant's counsel to read the information and a copy of the pamphlet to the jurors as a basis of their *voir dire* examination was error.—State v. Brooks, 480.

Same—Jury—Purpose of *Voir Dire* Examination—Nature of Right.

26. The *voir dire* examination of jurors is a right secured to defendant by statute, its purpose being to ascertain whether there exist grounds for challenge for cause, and to enable counsel to exercise intelligently the peremptory challenges allowed by law.—State v. Brooks, 480.

Same—Jury—Refusal of Challenge—When Error.

27. If an objectionable juror is forced upon a defendant after he has exhausted his peremptory challenges, a ruling of the court denying a challenge for cause as to such juror will constitute reversible error, if the challenge should have been sustained.—State v. Brooks, 480.

Same—Impartial Jury—Statutes—Constitution.

28. The right to trial by an impartial jury, every member of which is impartial, given by the Constitution (Article III, section 16), is an unqualified one, which it is beyond the power of the legislature to curtail, and any provisions of the statutes which relate to the selection of the jury are to be understood as merely providing the means by which the constitutional guaranty may be exercised to the fullest extent.—State v. Brooks, 480.

Same—Prejudiced Juror—Refusal of Challenge—Error.

29. A juror who testified on his *voir dire* examination that he entertained a bitter prejudice against the Industrial Workers of the World and against every member of it, which would abide with him throughout the trial, that it would require evidence to remove the prejudice, and less evidence to convict defendant, who was a member of the organization, than if he were not a member, was not an impartial juror, and refusal to grant a challenge for cause was error.—State v. Brooks, 480.

Same—Depriving Defendant of Substantial Right—Reversal of Judgment.

30. Whenever it is made to appear in a criminal prosecution that a substantial right has been denied to a defendant, his conviction will not be upheld on appeal.—State v. Brooks, 480.

Same—Conviction—*Quantum* of Proof Necessary.

31. The least *quantum* of proof upon which a judgment of conviction can be made to rest is that produced by evidence sufficient to establish the defendant's guilt beyond a reasonable doubt.—State v. Brooks, 480.

Same—Selection of Jury—Failure to Observe Statute—Effect.

32. The fact that the evidence is sufficient to establish the guilt of one accused of crime, cannot be held to have rendered harmless the failure of the court to observe the law in selecting the jury to try him.—State v. Brooks, 480.

Same—Manner of Conducting Trial—Remarks of Judge—New Trial.

33. Remarks of the judge during the progress of a criminal trial and the manner of conducting it may be such as to indicate to the jury that he is prejudiced against defendant and deprive him of a fair trial, necessitating a reversal of the judgment of conviction.—State v. Brooks, 480.

Same—Information—Sufficiency.

34. Information charging that defendant circulated a pamphlet during the progress of the war containing, among others, the statements: "Let those who own the country do the fighting. Put the wealthiest in the front ranks; the middle class next; follow these with judges, lawyers, preachers, and politicians. Let the workers remain at home and enjoy what they produce. Follow a declaration of war with an immediate call for a general strike. Make the slogan, 'Rebellion sooner than war,'" the natural and probable effect of which was to obstruct the draft and the enlistment service of the government, *held*, sufficient to charge sedition.—State v. Brooks, 480.

Homicide—Evidence—Sufficiency.

35. Evidence *held* sufficient to warrant a verdict of murder in the second degree, it showing that defendant, accompanied by his brother, went to the home of deceased, with whom they had a quarrel and against whom defendant had made threats that he would "get" or "fix" him, and killed him.—State v. Vandervoort, 540.

Same—Eye-witness—When State not Obliged to Call.

36. In a prosecution for homicide, where the only eye-witness was a brother of the defendant, and an accomplice though not jointly

charged, whose name had been indorsed on the information, refusal to grant a motion to require the state to place such witness upon the stand, *held* not error, the court being advised by the county attorney that, if called, the witness would by false swearing and the concealment of material facts injure the state's case.—State v. Vandervoort, 540.

Jury—Purpose of *Voir Dire* Examination.

37. The purpose of the *voir dire* examination of veniremen is to enable counsel not only to determine whether there exists a state of mind on the part of any juror which will prevent him from acting impartially and without prejudice to the substantial rights of either party, but also to exercise intelligently the peremptory challenges allowed by law.—State v. Smith, 563.

Sedition— Jury— *Voir Dire* Examination—Benefit of Doubt—Erroneous Exclusion of Proper Question.

38. In a prosecution for sedition, the defendant being charged with the publication of an article in a newspaper which was calculated to incite or inflame resistance to the state council of defense in connection with the prosecution of the war, refusal to permit a juror on his *voir dire* examination to answer the question whether, if there was a reasonable doubt in his mind as to whether or not the article was calculated to incite or inflame resistance, *etc.*, he would acquit defendant, was error, in the absence of an instruction that he could be convicted only if the jury found beyond a reasonable doubt that the statement was calculated to incite or inflame resistance to constituted authority.—State v. Smith, 563.

Same—Assumption of Fact as Proven—Error.

39. In a criminal cause, the district court cannot take from the jury or assume as proven, any essential fact, no matter how conclusive the evidence may appear to be.—State v. Smith, 563.

Same—*Mala Prohibita*—Intent Immaterial.

40. In a statutory crime, enacted under the police power of the state, it is not necessary to make evil intent an ingredient of the prohibited act.—State v. Smith, 563.

Same—Publication of Seditious Article—Intent.

41. *Held*, that the intent of the person deliberately writing or publishing a seditious article contrary to the provisions of Chapter 11, Extra. Session, Laws of 1918, is immaterial and not an ingredient of the crime of sedition; hence error was not committed by the trial court in sustaining objections to questions asked prospective jurors or witnesses concerning such intent.—State v. Smith, 563.

Same—Intent—Instructions.

42. Since intent is not an ingredient of the crime of sedition consisting of the publication of an objectionable article in a newspaper, refusal of instructions embodying the provisions of sections 8112 and 8113, Revised Codes, relative to union of act and intent and how intent may be manifested, was proper.—State v. Smith, 563.

Same.

43. *Held*, that it was error to instruct the jury in a prosecution for publishing a seditious article, that, the state having proven that the law had been violated, guilty intent is conclusively presumed, since it included the intent to publish the article which was immaterial, and did not limit it to the intent presumed from a publication likely to incite and inflame resistance to duly constituted federal or state authority.—State v. Smith, 563.

Same—Intent.

44. The deliberate commission of an act includes the intent to commit the act.—State v. Smith, 563.

Same—Intent—Disputable Presumptions.

45. The presumption that an unlawful act was committed with an unlawful intent is disputable.—State v. Smith, 563.

Same—Defense—Intent—Improper Refusal of Offer of Proof.

46. *Held,* that conviction for publishing a seditious article could be had only if the act was deliberately or intentionally committed, and that it was therefore error to exclude an offer of proof that defendant, as vice-president of a publishing company, did not intend to publish the article, *i. e.*, that it was published without his knowledge or against his express command, or through the negligence of an employee,—the testimony to be weighed against the disputable presumption of intent arising from the commission of the act.—State v. Smith, 563.

Same—Officer of Corporation—Defense—Instruction—Proper Refusal.

47. An instruction that failure of defendant, vice-president of a publishing company, to prevent the publication of a seditious article, was not sufficient to render him criminally responsible, was properly refused, mere failure to act not being sufficient to exonerate him. State v. Smith, 563.

Same—Conviction for Crime Other Than Charged—Erroneous Instruction.

48. Defendant having been charged with publishing a certain seditious article directed against the state council of defense, it was error to charge the jury that they could adjudge him guilty if they found that he uttered, wrote or printed *any* language at any time between two dates covering a period of seven months calculated to incite or inflame resistance to any duly constituted state authority, *etc.*, in the absence of an instruction limiting it to the particular act charged against defendant, and no evidence appearing in the record to show that he wrote or printed the article in question.—State v. Smith, 563.

Same—Instructions—How to be Framed.

49. An instruction in a criminal prosecution should be so explicit and so closely connected with the facts of the case as to enable the jury to apply the law to the facts.—State v. Smith, 563.

Same—Evidence—Stenographer Reading from Transcript—When Proper.

50. Where a stenographer is called as a witness, the better practice is to have him read from his notes, although he may be permitted to read from the transcript thereof if a sufficient foundation has been laid establishing his ability and accuracy, a liberal cross-examination being permitted in this respect.—State v. Smith, 563.

Same—Evidence—Admissions—When not Admissible.

51. Testimony in which defendant admitted responsibility for publishing an article of a date different from the one charged in the information as seditious should have been stricken, in view of an erroneous instruction to the jury that the crime charged was complete if defendant had published *any* seditious language between two given dates.—State v. Smith, 563.

Same—Witnesses—Former Conviction of Felony—Cross-examination.

52. A witness may properly be required under section 8907, Revised Codes, to answer the question, on cross-examination, if he had not been convicted of a felony.—State v. Smith, 563.

Same—Free Speech—Free Press—Constitutional Guaranties.

53. The constitutional guaranty of free speech and free press was not suspended by the war, abuse of the guaranty only being punishable.—State v. Smith, 563.

Same—Limits of Free Speech and Free Press—Power of Legislature.

54. Though the constitutional guaranty of free speech and free press was not suspended by the war, the legislature could properly by Chapter 11, Extra. Session Laws of 1918, define the limits of both by declaring that the use of language calculated to incite or inflame resistance to a duly constituted federal or state authority in connection with the prosecution of the war constituted an abuse of that liberty and a crime against the state.—State v. Smith, 563.

Same—Place of Crime—Proof—Jurisdiction.

55. Under section 16, Article III, of the Constitution, proof of the charge in the information that defendant published the seditious article mentioned therein, in a certain county, was indispensable to give the district court of such county jurisdiction to try the cause. State v. Smith, 563.

Same—Language Calculated to Influence, *etc.*—Definition.

56. *Held*, that the word "calculated" as used in the Sedition Act above, prohibiting, *inter alia*, the publishing of words "calculated to incite or inflame resistance," *etc.*, was intended to be understood to mean "likely to produce" the above effect, whether intended that it should or not.—State v. Smith, 563.

Same—Newspaper Publication—Circulation—Evidence.

57. Evidence of the extent of the circulation of a daily newspaper was not evidence of its circulation at a date a month previous when it was a weekly.—State v. Smith, 563.

Same—Seditious Language—Effect—Jury Question.

58. Whether alleged seditious language was or was not calculated to have the effect mentioned above (paragraph 56) was a question of fact for the jury from all the surrounding facts and circumstances, including the manner and extent of publication, as well as the inherent quality of the language used.—State v. Smith, 563.

Same—Publication of Seditious Article—Evidence—Insufficiency.

59. *Held*, that where the only evidence of a publication of alleged seditious language calculated to incite or inflame resistance to the Montana Council of Defense consisted of the testimony of a member of the council to the effect that he as a subscriber received a copy of the paper containing the article through the mail and that he read it, it was insufficient, in the absence of further testimony that the article was made known to any person other than such member of said council, to show a publication the effect of which was likely to incite or inflame resistance to the council, or to prove the offense charged in the information.—State v. Smith, 563.

CROSS-EXAMINATION.

See Evidence, 19–23, 34, 47.

CUSTOM.

See, also, Evidence, 39, 40.

Negligence—Custom Does not Exonerate.

1. Custom never exonerates from the imputation of negligence.—Surman v. Cruse, 253.

DAMAGES.

See, also, Excessive Verdicts.

Real Property—Contract of Sale—Breach—Liquidated Damages—Rent.

1. Where a contract of sale of land contains a provision that a fixed amount may be regarded as liquidated damages or as rent in case of default in any deferred payment of the purchase price, the instrument is executory in character, and not a sale.—Wright Land & Investment Co. v. Even, 1.

Eminent Domain—Vendor and Purchaser—Who Entitled to Damages.

2. Where land is taken by a railroad company under its power of eminent domain, the right to compensation for damages accrues to the owner at once, and does not pass to a subsequent purchaser by the mere conveyance of the land.—Smith v. Northern Pacific Ry. Co., 14.

Eminent Domain—Computation.

3. Under section 7342, Revised Codes, damages suffered by the owner of land taken by condemnation proceedings for a railroad right of way must be computed as of the day of the summons.—Gallatin Valley etc. Ry. v. Nieble, 27.

Carrier and Shipper—Purpose of Notice of Claim of Loss—Measure of Damages.

4. The notice of claim of loss sustained in transportation by a shipper of livestock is to enable the carrier to make investigation as to the situation and conditions existing at the time and in order that there may be no unreasonable delay in bringing action, and does not bar recovery of a larger amount than that stated in it, except, perhaps, where the sum claimed has been tendered in settlement.—Parham v. Chicago, M. & St. P. Ry. Co., 492.

DEEDS.

Reconveyance for fraud,—see Fraud, 1–3.

Loss or Destruction—Re-execution—Equity.

1. Where a deed, after execution and delivery, has been lost or destroyed before recordation, or where the grantor has fraudulently gained possession of and destroyed it, and the title of the grantee is thus affected, a court of equity may decree a re-execution of it.—Jacobson v. Roman, 299.

Same—Re-execution—At Whose Expense.

2. In the case of loss or destruction of a deed before recordation without the fault of the grantor, restoration should not be had at his expense, unless, upon demand, accompanied by the presentation to him of a new deed ready to be executed by him, he refuses to execute and acknowledge it; where, however, he fraudulently gains possession of and destroys it, the wrong is remediable at his expense. Jacobson v. Roman, 299.

Same—Re-execution—Conveyance Prerequisite—Jurisdiction.

3. Jurisdiction to decree re-execution of a lost or destroyed deed presupposes a conveyance; hence where a deed alleged to have been fraudulently obtained and destroyed by the grantor had never been accepted by the grantee, there was no delivery, and therefore no conveyance, and judgment denying the relief prayed for was proper. Jacobson v. Roman, 299.

Recordation—Property Right.

4. The right of the owner of real property to have his evidence of title appear properly upon the record is a substantial property right recognized by the law.—Jacobson v. Roman, 299.

DEFAULT JUDGMENTS.

See Judgments, 1–3, 5, 7.

DEFENSES.

Assumption of risk—When defense not available,—see Personal Injuries, 18.

Contributory negligence—Partial defense—Must be pleaded,—see Pleading and Practice, 7.

Truth of alleged slanderous statement,—see Slander, 1.

DEMURRER.

Order sustaining—Remedies,—see Pleading and Practice, 19.

DEPUTIES.

Appointment of caretaker of attached property by deputy sheriff—Liability for compensation,—see Sheriffs, 1, 2.

Special assessors—Compensation,—see Counties, 1.

DISBARMENT.

See Attorney and Client, 1.

DISCRETION.

County commissioners—Powers involving discretion nondelegable,—see County Commissioners, 2, 3.

Disposition of costs in action to quiet title where both parties are partially successful,—see Costs, 6.

New trial—Insufficiency of evidence,—see New Trial, 1.

Reopening case,—see Pleading and Practice, 1.

Submission of special interrogatories,—see Special Interrogatories, 1.

DISMISSAL.

Of complaint—Commingling causes of action—Failure to separately state and number,—see Pleading and Practice, 10.

Of proceedings under Search and Seizure Act (Laws of 1917, Chap. 143), when proper,—see Intoxicating Liquors, 8.

DISTRICT COURTS.

Judges—Increase of salaries—Constitutional limitations,—see Officers, 1–3.

Judges—Remarks during trial—May constitute cause for new trial,—see Criminal Law, 33.

Must disregard procedural irregularities,—see Pleading and Practice, 22.

Annulment of Marriage—Power of District Court to Grant Temporary Alimony.

1. *Held*, that though the district court has no statutory authority to do so, it may, under its equity jurisdiction in such matters, grant temporary alimony, attorney's fees and suit money to the wife in a suit by the husband for the annulment of the marriage on the ground of her physical incapacity, such power continuing during the pendency of the suit in the district court or in the supreme court on appeal.—State ex rel. Wooten v. District Court, 517.

DROUGHT.

Issue of county bonds—Management of fund—Powers of county commissioners,—see County Commissioners, 3.

ELECTION.

Effect of failure to move that state elect upon which one of a number of offenses it relied,—see Criminal Law, 15.

ELECTIONS.

Illegal Votes—Evidence.

1. Where it appears in an election contest that a voter was not a legal one, any person with the requisite knowledge may testify as to the person for whom he voted.—Gervais v. Rolfe, 209.

Same—Circumstantial Evidence.

2. Where it does not appear from direct testimony for what candidate an unqualified voter voted, the fact may be shown by circumstantial evidence.—Gervais v. Rolfe, 209.

Same—Evidence.

3. A voter who does not remember for whom he voted may be asked for whom he intended to vote, as a circumstance tending to raise a presumption for whom he did vote.—Gervais v. Rolfe, 209.

Same—Evidence—Admissibility.

4. An unqualified voter who could not read or write English was properly permitted to testify that one of the election judges read the names on the ballot to him; that whenever the name of a candidate for whom he wished to vote was read, he placed a cross before the name; that he wanted to vote for contestant; that the election judge told him where to place the mark, and that he voted for contestant. Gervais v. Rolfe, 209.

Same—Apportionment Between Contestant and Contestee—When Proper.

5. Where it was impossible for the trial court in an election contest to determine from the evidence for whom alleged illegal votes had been cast, its action in apportioning them under the rule approved in Heyfron v. Mahoney, 9 Mont. 497, was proper.—Gervais v. Rolfe, 209.

Contest—Burden of Proof.

6. The certificate of election in the hands of respondent was *prima facie* evidence of his right to the office in contest, and appellant had the burden of proving that respondent received a sufficient number of illegal votes charged by him to have been cast, to change the result. Gervais v. Rolfe, 209.

Same—Costs—When not Recoverable.

7. Where contestee in an election contest did not file his memorandum of costs until ten days after the court's findings had been filed, it was properly stricken from the files.—Gervais v. Rolfe, 209.

Constitution—Referendum Petition—Number of Signatures Required.

8. Under the amendment to section 1 of article V of the Constitution, a petition for referendum to be effective must be signed by five per cent of all the legal voters of the state, and each of two-fifths of all the counties must furnish as signers five per cent of the legal voters of that county; if then the whole number from those counties does not make the required five per cent, the petition may be rendered effective by a sufficient number of signers from other counties to supply the deficiency.—State ex rel. Gleason v. Stewart, 397.

Same—Referendum—Suspension of Act—Number of Signatures Required.

9. *Held*, on *mandamus*, that where suspension of a legislative Act pending submission thereof to a vote of the people is sought through the medium of a referendum, the petition must be signed by fifteen per cent of the legal voters of a majority of the whole number of counties of the state,—not by fifteen per cent of all the legal voters of the state.—State ex rel. Gleason v. Stewart, 397.

"Legal Voter"—Definition.

10. A legal voter, possessing the qualifications of citizenship, age, residence, *etc.*, is one who has registered.—State ex rel. Gleason v. Stewart, 397.

Referendum—County Clerk—Certifying List of Legal Voters—Invalid Provision.

11. *Held*, that the provision of section 108, Revised Codes, requiring county clerks to compare the signatures on a petition for referendum with their signatures on the registration books and blanks for the preceding general election and certify them to the secretary of state as legal voters, is invalid as excluding all persons who had become legal voters in the interim between the last general election and the time of signing such petition.—State ex rel. Gleason v. Stewart, 397.

Same—Constitution—County Clerk—Irregularity in Certifying Number of Legal Voters—Effect.

12. A legal voter cannot be prevented from exercising his constitutional privilege of signing a referendum petition looking to the suspension of an Act of the legislature, by a showing that a county clerk had not technically pursued the direction of the statute in ascertaining the number of legal voters of his county entitled to sign the petition.—State ex rel. Gleason v. Stewart, 397.

Indebtedness—Special Elections—Notice—Sufficiency.

13. A special election called under the provisions of Chapter 8, Extra. Session, Laws of 1919, to determine whether indebtedness should be incurred by a county to aid drought sufferers, *held* on application for injunction, not to have been invalidated by failure to post the required notice in certain precincts owing to the interruption of the mail and impassability of the roads caused by a storm, where the electors had been advised of the election through the medium of newspapers, where fraud was not charged, the number of electors voting greatly exceeding the number of votes cast at a preceding election held for the same purpose at which the proposition was defeated, and in view of the provision of the Act that failure to give notice should not invalidate an election if there was a substantial compliance with the requirements of the statute in other respects.—State ex rel. Nelson v. Timmons, 602.

ELECTRICITY.

See Contracts, 5–14.

EMINENT DOMAIN.

Railroads—Vendor and Purchaser—Who Entitled to Damages

1. Where land is taken by a railroad company under its power of eminent domain, the right to compensation for damages accrues to the owner at once, and does not pass to a subsequent purchaser by the mere conveyance of the land.—Smith v. Northern Pacific Ry. Co., 14.

Railroad Right of Way—General Neighborhood Benefits—Evidence—Inadmissibility.

2. Where land is taken by a railroad company for right of way purposes, general neighborhood benefits resulting to the owner in common with others from the construction of the road, the building of a depot, elevator, *etc.*, but not peculiar or special to himself, may not be set off against the damages resulting to him from the taking of the land; hence evidence of such general benefits was properly excluded.—Gallatin Valley Elec. Ry. v. Nieble, 27.

Damages—Computation.

3. Under section 7342, Revised Codes, damages suffered by the owner of land taken by condemnation proceedings for a railroad right of way must be computed as of the day of the summons.—Gallatin Valley Elec. Ry. v. Nieble, 27.

Judgment—Compound Interest.

4. A judgment in condemnation proceedings arrived at by deducting from the amount awarded to the owner of the land taken the sum paid into court at the time the plaintiff railroad company was let into possession, computing interest upon the balance so ascertained from that date to the date of entry of judgment and adding it to such balance, the sum total to bear interest at eight per cent per annum until paid, was not objectionable as allowing compound interest.—Gallatin Valley Elec. Ry. v. Nieble, 27.

Offers Made to Owner—Evidence—Harmless Error.

5. Error in permitting the husband of defendant in condemnation proceedings to testify that an offer of $125 per acre of the land in question had been made, *held* to have been rendered harmless by an instruction to the jury not to consider any evidence of offers made and refused at any time.—Gallatin Valley Elec. Ry. v. Nieble, 27.

EMPLOYERS' LIABILITY ACT.

See Personal Injuries, 13, 14.

EQUITY.

Findings,—see Findings, 1, 2.
Jury trial,—see Jury, 3.
Re-execution of lost deed,—see Deeds, 1–9.

ESCROWS.

See Real Property, 1.

ESTATES OF DECEASED PERSONS.

Executors and Administrators—Claim Against Estate—Action on Claim—Witnesses—Competency.

1. An attorney is competent to testify in his action against an administrator to recover fees for services rendered the estate as to transactions between himself and the decedent, the district court being granted discretion by section 7891, Revised Codes, to permit such testimony when, without it, injustice will be done, and qualified to verify his claim against the estate.—Harwood v. Scott, Admx., 83.

Same—Disallowance of Claim—Action—Complaint.

2. Where a claim against an estate is disallowed by the executor or administrator, the suit brought by the claimant must be upon the identical claim presented for payment.—Harwood v. Scott, Admx., 83.

Same—Presentation of Claim—Sufficiency.

3. If the presentation of a claim against an estate, which was rejected, advised the executor or administrator of its nature, of the amount claimed, and was explicit enough to bar another action on the same demand, it was sufficient; an observance of the technical rules of pleading not being required.—Harwood v. Scott, Admx., 83.

Same—Presentation of Claim—Complaint—Variance—What Does not Constitute.

4. Where the only difference between a claim presented to and rejected by an administrator, and the complaint in an action on the rejected claim, was one of phraseology and not of substance, the district court was not warranted in dismissing the action on the ground of fatal variance between the claim and the pleading.—Harwood v. Scott, Admx., 83.

Same—Settlement of Accounts—Record on Appeal.

5. The record on appeal from an order settling the final account of an executor which contained the papers used at the hearing properly authenticated by the clerk of the court was sufficient, it not being necessary to bring up the whole record of the lower court.—In re Estate of Murphy, 273.

Same—Record on Appeal.

6. Errors in former accounts of an executor are not open for review on appeal from an order settling a subsequent one; hence matters pertaining to them are not properly a part of the record.—In re Estate of Murphy, 273.

Same—Appeal—"Party Aggrieved."

7. A son and heir at law who was pecuniarily and materially affected by a decree settling the final account of the executor and distributing the estate was a "party aggrieved" by, or a person interested in, the decree, within the meaning of the statute allowing an appeal to such person in probate matters.—In re Estate of Murphy, 273.

Same—Appeal—*Res Adjudicata.*

8. An heir who permitted the will of his father to be probated without contest, accounts of the executor settled and allowed, and partial distribution of the assets made without timely objection or appeal, was foreclosed from attacking such proceedings on appeal from an order settling the final account of the executor and making final distribution.—In re Estate of Murphy, 273.

Same—Decree—Statute of Limitations.

9. On the expiration of one year within which a will after probate may be contested, as provided by section 7407, Revised Codes, which is in effect a statute of limitations the running of which commences with the date of the admission of the will to probate, the probate becomes final and is not open to either direct or collateral attack.—In re Estate of Murphy, 273.

Same—Attack on Will—Estoppel.

10. Where the probate of a will leaving property in trust was not contested, and after the estate had been administered upon under the terms of the will and all of the property was out of the hands of the executor, appellant was estopped, on appeal from an order settling the final account of the executor, to attack the provisions of the will creating the trust.—In re Estate of Murphy, 273.

Same—Confirming Action of Executor—Harmless Error.

11. *Held,* that the action of the district court confirming that of an executor in turning property of the estate in his charge over to testamentary trustees without first obtaining an order of distribution,

was harmless, it appearing that the executor reported his action to the court which thereafter approved it.—In re Estate of Murphy, 273.

Same—Distribution of Estate—Worthless Note.

12. Where all debts, bequests and payments provided for under a will had been paid and the only property in the hands of the executor was a worthless note, which was disposed of by the decree of final distribution, complaint that the estate was not ready to be closed, that the property had not been distributed and that the executor should not have been discharged, *held* without merit.—In re Estate of Murphy, 273.

ESTOPPEL.

Probate Proceedings—Attack on Will.

1. Where the probate of a will leaving property in trust was not contested, and after the estate had been administered upon under the terms of the will and all of the property was out of the hands of the executor, appellant was estopped, on appeal from an order settling the final account of the executor, to attack the provisions of the will creating the trust.—In re Estate of Murphy, 273.

Mining Claims—Relocation—Defective Certificate of Location.

2. One claiming under a relocation of mining ground by virtue of a prior locator's forfeiture impliedly admits the validity of the prior location and is estopped to assert defects in the certificate of location to quiet title.—Heilman v. Loughrin, 380.

Cities and Towns—Special Improvements—Adjournment of Hearing.

3. A property owner whose right to protest against the creation of a special improvement district was foreclosed by failure to act within the fifteen days prescribed by the statute could not complain that the council, instead of hearing the protest at the first regular meeting after expiration of the time fixed, heard it at a later date.—Harvey v. Town of Townsend, 407.

EVIDENCE.

See, also, Criminal Law; Witnesses.

Eminent Domain—Railroad Right of Way—General Neighborhood Benefits—Evidence—Inadmissibility.

1. Where land is taken by a railroad company for right of way purposes, general neighborhood benefits resulting to the owner in common with others from the construction of the road, the building of a depot, elevator, *etc.*, but not peculiar or special to himself, may not be set off against the damages resulting to him from the taking of the land; hence evidence of such general benefits was properly excluded.—Gallatin Valley Elec. Ry. v. Nieble, 27.

Same—Offers Made to Owner—Evidence—Harmless Error.

2. Error in permitting the husband of defendant in condemnation proceedings to testify that an offer of $125 per acre of the land in question had been made, *held* to have been rendered harmless by an instruction to the jury not to consider any evidence of offers made and refused at any time.—Gallatin Valley Elec. Ry. v. Nieble, 27.

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3. An attorney is competent to testify in his action against an administrator to recover fees for services rendered the estate, as to transactions between himself and the decedent, the district court

being granted discretion by section 7891, Revised Codes, to permit such testimony when, without it, injustice will be done, and qualified to verify his claim against the estate.—Harwood v. Scott, Admx., 83.

Trial—*Prima Facie* Case—Contradictory Testimony—Credibility.

4. Where a *prima facie* case has been made, contradictory testimony does not necessarily overcome it, but may amount to a mere conflict in the evidence, the ultimate facts to be determined by court or jury.—State v. Nielson, 137.

Judicial Notice.

5. Courts will take judicial notice of the number of general and primary elections, and regular and special sessions of the legislature between two certain dates.—State ex rel. Goodman v. Stewart, 144.

Personal Injuries—Mortality Table.

6. Mortality tables are competent evidence to aid the jury in determining the probable duration of the life of an injured employee, and may be used to aid them, by comparing his earnings before and after the injury, to ascertain the amount which will compensate him for his loss by reason of impairment of his earning capacity.—Cornell v. Great Northern Ry. Co., 177.

Same—Mortality and Annuity Tables.

7. In determining the amount to be awarded plaintiff in a personal injury action, the jury must be left to exercise their discretion, unlimited by any fixed standard, after examining the facts and circumstances of the case, considering annuity and mortality tables, *etc.* Cornell v. Great Northern Ry. Co., 177.

Same—Mortality Tables—Purpose of Introduction.

8. The office of mortality tables in a personal injury case is to furnish the jury a basis by which they may ascertain the present worth of the several sums which, but for the injury, would have been received by plaintiff in the form of deferred payments, and the earning power of money in the general community in which the injury occurred; they can only serve as a guide in determining the amount of the verdict and not as an absolute standard by which to fix the award.—Cornell v. Great Northern Ry. Co., 177.

Same—Loss of Sight—Cost of Attendant—Evidence—When Incompetent.

9. Evidence that it would cost $100 a month to provide an attendant for a blind man, *held* incompetent where the question whether plaintiff, where sight, though impaired, was not destroyed, would ever need an attendant was left to speculation as to what might or might not occur in the future.—Cornell v. Great Northern Ry. Co., 177.

Same—Total Blindness—Care and Attendance—When Evidence Admissible.

10. *Obiter:* In a case in which the plaintiff has become totally blind by reason of the injury complained of, or where there is evidence tending to show a reasonable probability that the injury will finally produce that result, the jury may, in assessing the damages, take into consideration the fact that he will need care and attention by others, if there is evidence showing with reasonable certainty that such need will arise and when it will arise.—Cornell v. Great Northern Ry. Co., 177.

Election Contest—Illegal Votes.

11. Where it appears in an election contest that a voter was not a legal one, any person with the requisite knowledge may testify as to the person for whom he voted.—Gervais v. Rolfe, 209.

Same—Illegal Votes—Circumstantial Evidence.

12. Where it does not appear from direct testimony for what candidate an unqualified voter voted, the fact may be shown by circumstantial evidence.—Gervais v. Rolfe, 209.

Same—Evidence—Admissibility.

13. A voter who does not remember for whom he voted may be asked for whom he intended to vote, as a circumstance tending to raise a presumption for whom he did vote.—Gervais v. Rolfe, 209.

Same.

14. An unqualified voter who could not read or write English was properly permitted to testify that one of the election judges read the names on the ballot to him; that whenever the name of a candidate for whom he wished to vote was read, he placed a cross before the name; that he wanted to vote for contestant; that the election judge told him where to place the mark, and that he voted for contestant. Gervais v. Rolfe, 209.

Same—Apportionment Between Contestant and Contestee—When Proper.

15. Where it was impossible for the trial court in an election contest to determine from the evidence for whom alleged illegal votes had been cast, its action in apportioning them under the rule approved in Heyfron v. Mahoney, 9 Mont. 497, was proper.—Gervais v. Rolfe, 209.

Forcible Entry—*Prima Facie* Case—Sufficiency.

16. Where one in possession of a dwelling-house, while temporarily absent, leaves the doors and windows securely locked, and upon his return finds an intruder therein, without his consent, the circumstances indicating an entry by forcing or breaking open the windows or doors, a showing of other force or violence is not necessary to warrant a submission of a cause of action in forcible entry to the jury.—Sprinkle v. Anderson, 223.

Railroads—Livestock—Injury or Killing—*Prima Facie* Case of Negligence.

17. Proof of the injury or killing of livestock on the unfenced portion of a railroad track near a siding or spur establishes a *prima facie* case of negligence on the part of the company, notwithstanding the provisions of section 4308, Revised Codes.—Knop v. Chicago, Milwaukee & St. Paul Ry. Co., 288.

Work and Labor—Testimony of Unqualified Nonexpert Witness—Effect.

18. Where plaintiff in an action on *quantum meruit*, after testifying to an express agreement fixing his compensation, stated that the sum agreed upon was the reasonable value for the services rendered, the fact that he did so without first technically qualifying as an expert witness was inconsequential.—Daly v. Kelley, 306.

Sheriffs—Deputies—Appointment of Caretaker—Cross-examination.

19. Since defendant sheriff's deputy had the authority to appoint a caretaker for attached property as an incident to his duty to attach and safely keep it, a question on cross-examination whether this was the first caretaker he had ever appointed was not improper.—Daly v. Kelley, 306.

Criminal Law—Cross-examination of Defendant—Waiver of Constitutional Privilege.

20. Where defendant in a criminal prosecution takes the stand as a witness in his own behalf, and testifies that he did not commit the crime imputed to him, he waives his constitutional privilege, and cannot refuse to testify to any facts which would be competent evidence in the case if proved by other witnesses.—State v. Smith, 349.

Same—Cross-examination of Defendant.

21. The general rule that cross-examination must be confined to matters about which the witness has been examined on his direct examination, or matters connected therewith directly or indirectly, *held* controlling where defendant offers himself as a witness, though a wide latitude in the examination is permissible.—State v. Smith, 349.

Party Cannot Make Out Case on Cross-examination.

22. Under pretense of cross-examination of a witness of his adversary, a party cannot make out his own case.—State v. Smith, 349.

Criminal Law—Cross-examination of Defendant—Impeachment—Error.

23. Where, after defendant, charged with sedition, had testified in his own behalf simply denying that he made the utterances testified to by the state's witnesses, the county attorney cross-examined him in the manner of laying the foundation for impeachment, as to other seditious language not charged in the information nor inquired into in the state's case in chief, he made him his own witness and was bound by his answers, and in thereafter permitting him to be impeached the court committed error.—State v. Smith, 349.

Same—Hearsay Testimony.

24. The testimony of a witness, fixing a date by means of an entry made by his wife in a diary kept by her, was hearsay and incompetent.—State v. Smith, 349.

Promissory Notes—Failure of Consideration—Evidence—Judgment-roll in Previous Action—Admissibility.

25. In an action on a promissory note, a judgment-roll showing the cancellation of a contract for the sale of land and recovery of the premises by the seller was evidence of failure of consideration for the note given in payment, and if a bank suing on the note took it with knowledge of the failure of consideration and held it subject to the defense set up, admission of the roll in evidence was proper.—First National Bank of Lewistown v. Wilson, 384.

Cities and Towns—Special Improvements—Overruling of Protests—What Sufficient Evidence.

26. Where the record showed a protest to a proposed special improvement, and that after hearing it the resolution was passed and approved by the mayor, the action of the council was sufficient evidence that the protest was overruled.—Harvey v. Town of Townsend, 407.

Fraud—Sale of Farm Lands—Value—Evidence—Admissibility.

27. Where land and personal property had been sold together for a lump sum, and the buyer brought suit for damages for fraudulent representations with reference to the land only, testimony concerning the value of the personal property was admissible to arrive at the contract price of the land.—Koch v. Rhodes, 447.

Same—Crops Produced—Fraudulent Statement of Fact—Evidence—Admissibility.

28. A statement alleged to have been made by defendant for the purpose of inducing plaintiff to buy agricultural land, that he (defendant) had never cut less than 200 tons of hay and had cut more, was not a mere expression of opinion but a statement of fact and as such admissible in evidence.—Koch v. Rhodes, 447.

Same—Evidence—Admissibility.

29. To prove the falsity of the statement referred to in paragraph 28 above, plaintiff was rightly permitted to show that the land, though properly cultivated, produced but fifty tons of hay in what was deemed a very good year for hay.—Koch v. Rhodes, 447.

Same—Latitude of Proof Permissible.

30. Where fraud is alleged, great latitude of proof is allowed, and every fact or circumstance from which a legal inference of fraud may be drawn is admissible.—Koch v. Rhodes, 447.

Same—False Representations—Knowledge in Vendor—Evidence—Admissibility.

31. Statements made to a third person by defendant in attempting to secure a loan for plaintiff about the time the contract of sale between the parties was made, tending to show that he knew that representations he had made to plaintiff were false, were admissible, the fact that he acted as agent of plaintiff not rendering them inadmissible.—Koch v. Rhodes, 447.

Same—Varying Terms of Writing—Parol Evidence—Admissibility.

32. Where land was described by government subdivisions in the contract of sale, without reference to the number of acres embraced in the tract, evidence of oral representations made to the buyer by the seller, prior to its execution, that it contained a greater acreage than it actually did, was admissible for the purpose of showing fraud in the inception of the contract, and was not objectionable as varying the terms of the writing.—Koch v. Rhodes, 447.

Assault—Police Officer Making Arrest—Concealed Weapons Statute—Negativing Exception.

33. Where a police officer's defense in a prosecution for assault was that he struck the prosecuting witness on meeting with resistance while attempting to arrest him for carrying a concealed weapon, it was not necessary for him to negative the exception contained in the concealed weapon statute as to permit to carry a weapon.—State v. Prlja, 461.

Same—Concealed Weapons—Cross-examination—Harmless Error.

34. Refusal to permit cross-examination of the prosecuting witness as to whether he had a permit to carry a revolver and whether he knew it was against the law to carry one, if error, *held* harmless. State v. Prlja, 461.

Same—Police Officer Carrying Revolver in Courtroom—Harmless Error.

35. A police officer who carried a gun on his person in the courtroom while on trial for assault was not in a position to complain if prejudiced by the county attorney's question whether he felt it necessary to there carry the weapon, and the court's failure to rule upon his objection.—State v. Prlja, 461.

Same—Appeal—Trial—Objection to Evidence—Question Unanswered—Effect.

36. Where a question to which appellant made objection remained unanswered, he was in the same position as though his objection had been sustained and not entitled to complain.—State v. Prlja, 461.

Criminal Law—Conviction—*Quantum* of Proof Necessary.

37. The least *quantum* of proof upon which a judgment of conviction can be made to rest is that produced by evidence sufficient to establish the defendant's guilt beyond a reasonable doubt.—State v. Brooks, 480.

Carriers—Livestock—Contract of Carriage—Ambiguity—Parol Evidence.

38. Where a contract of carriage of livestock provided that transportation should be had to a named station in another state, and from thence via a given carrier and connections "to——" station, consigned to D., an ambiguity as to destination existed which could be explained by parol testimony.—Parham v. Chicago, M. & St. P. Ry. Co., 492.

Same—Livestock—Failure to Stop and Feed—Custom.

39. Where a contract for the shipment of livestock was made with reference to a custom, not mentioned therein, to stop over at a certain point for feeding, proof of the custom was admissible for the purpose of ascertaining the intent or understanding of the parties, and was not objectionable as tending to vary by parol the terms of the writing.—Parham v. Chicago, M. & St. P. Ry. Co., 492.

Custom.

40. While usage or custom cannot make a contract where none has been made, general usage affecting any branch of business furnishes good evidence of what is regarded as right and reasonable in the premises.—Parham v. Chicago, M. & St. P. Ry. Co., 492.

Carrier and Shipper—Notice of Claim of Loss—Secondary Evidence—Harmless Error.

41. Where there was valid proof of service of notice of claim for loss on the connecting carrier within the time fixed by the contract of carriage, error in admitting secondary evidence thereof, without demand on defendant to produce the original, was not prejudicial. Parham v. Chicago, M. & St. P. Ry. Co., 492.

Mortgages—Action to Compel Release—Intention of Parties—Parol Evidence—Admissibility.

42. In an action seeking the release of a mortgage, parol evidence was admissible to show that in addition to the sum of money mentioned in it as being secured by it, it was intended to secure future advances by the mortgagee to the mortgagor, as well as to secure defendant company's president against personal liability on a promissory note made to a third person for the benefit of the mortgagor. Noyes Estate v. Granite-Alaska Co., 511.

Homicide—Eye-witness—When State not Obliged to Call.

43. In a prosecution for homicide, where the only eye-witness was a brother of the defendant, and an accomplice though not jointly charged, whose name had been indorsed on the information, refusal to grant a motion to require the state to place such witness upon the stand, *held* not error, the court being advised by the county attorney that, if called, the witness would by false swearing and the concealment of material facts injure the state's case.—State v. Vandervoort, 540.

Sedition—Defense—Intent—Improper Refusal of Offer of Proof.

44. *Held*, that conviction for publishing a seditious article could be had only if the act was deliberately or intentionally committed, and that it was therefore error to exclude an offer of proof that defendant, as vice-president of a publishing company, did not intend to publish the article, *i. e.*, that it was published without his knowledge or against his express command, or through the negligence of an employee,—the testimony to be weighed against the disputable presumption of intent arising from the commission of the act.—State v. Smith, 563.

Same—Stenographer Reading from Transcript—When Proper.

45. Where a stenographer is called as a witness, the better practice is to have him read from his notes, although he may be permitted to read from the transcript thereof, if a sufficient foundation has been laid establishing his ability and accuracy, a liberal cross-examination being permitted in this respect.—State v. Smith, 563.

Same—Evidence—Admissions—When not Admissible.

46. Testimony in which defendant admitted responsibility for publishing an article of a date different from the one charged in the

information as seditious should have been stricken, in view of an erroneous instruction to the jury that the crime charged was complete if defendant had published *any* seditious language between two given dates.—State v. Smith, 563.

Same—Witnesses—Former Conviction of Felony—Cross-examination.

47. A witness may properly be required under section 8907, Revised Codes, to answer the question, on cross-examination, if he had not been convicted of a felony.—State v. Smith, 563.

Same—Newspaper Publication—Circulation.

48. Evidence of the extent of the circulation of a daily newspaper was not evidence of its circulation at a date a month previous when it was a weekly.—State v. Smith, 563.

Same—Place of Crime—Jurisdiction.

49. Under section 16, Article III, of the Constitution, proof of the charge that defendant published the seditious article mentioned therein, in a certain county was indispensable to give the district court of such county jurisdiction to try the cause.—State v. Smith, 563.

Same—Publication of Seditious Article—Evidence—Insufficiency.

50. *Held*, that where the only evidence of a publication of alleged seditious language calculated to incite or inflame resistance to the Montana Council of Defense consisted of the testimony of a member of the council to the effect that he as a subscriber received a copy of the paper containing the article through the mail and that he read it, it was insufficient, in the absence of further testimony that the article was made known to any person other than such member of said council, to show a publication the effect of which was likely to incite or inflame resistance to the council, or to prove the offense charged in the information.—State v. Smith, 563.

EXCESSIVE VERDICTS.

See Verdicts, 1, 2, 4.

EXECUTORS AND ADMINISTRATORS.

See Estates of Deceased Persons.

FENCES.

Injury to livestock,—see Railroads, 1–3.

FINDINGS.

Of referee—When conclusive,—see Referees, 1.

When Conclusive.

1. The findings of the district court in equity cases will never be reversed, except where the evidence clearly preponderates against them.—Bosanatz v. Ostronich, 197; Heilman v. Loughrin, 380.

Equity—Jury Trial.

2. In an equity case the trial judge may, but is not bound to, call a jury; where a jury is called, he may disregard their findings and substitute his own.—Bosanatz v. Ostronich, 197.

FIRE DEPARTMENT.

Removal of chief—Charges—Evidence—Sufficiency,—see Cities and Towns, 1–4.

FORCIBLE ENTRY.

"Breaking" Open—Sufficiency of Complaint.

1. *Held*, in an action in forcible entry, that an allegation of the complaint that though the doors and windows of the dwelling in question had been securely fastened, defendant forced open the doors and windows and entered the dwelling, *etc.*, was sufficient to constitute a "breaking" open of the doors and windows, under section 7269, subdivision 1, Revised Codes.—Sprinkle v. Anderson, 223.

Prima Facie Case—Sufficiency.

2. Where one in possession of a dwelling-house, while temporarily absent, leaves the doors and windows securely locked, and upon his return finds an intruder therein, without his consent, the circumstances indicating an entry by forcing or breaking open the windows or doors, a showing of other force or violence is not necessary to warrant a submission of a cause of action in forcible entry to the jury.—Sprinkle v. Anderson, 223.

FRAUD.

Real Property—Reconveyance—Complaint—Curing Defect by Answer.

1. In a suit for a reconveyance of land on the ground of fraud, failure of the complaint to allege that the persons making the fraudulent representations were acting for defendants (corporations) was cured by an allegation in the answer in effect asserting that the transaction was had in connection with the purchase.—Kummrow v. Bank of Fergus County, 390.

Same—Failure to Read Instrument—Complaint—Sufficiency.

2. Where a woman, unable to read or write the English language, who charged in her complaint that on making final proof on a desert land entry she was induced by the United States commissioner before whom proof was made, and a member of a firm (subsequently formed into a corporation), that it was necessary for her to sign, and she did sign, a water right location notice in order to acquire title to the lands, whereas the writing was a warranty deed, her failure to have the paper read and explained to her by some disinterested person did not bar her from seeking the relief demanded and dismissal of the action was error.—Kummrow v. Bank of Fergus County, 390.

Same—Grantee Liable to Grantor for Conveyance to Third Person After Demand for Reconveyance.

3. Where a deed alleged to have been fraudulently secured from the owner was made to a bank as security for a debt owing to it from the purchaser, and the seller upon learning of the fraud demanded a reconveyance from the bank, which, instead of doing so, conveyed to the purchaser, it did so at its peril and could not escape liability on the ground that concededly no fraud was practiced by it on the seller in the original transaction.—Kummrow v. Bank of Fergus County, 390.

Sale of Farm Lands—Value—Evidence—Admissibility.

4. Where land and personal property had been sold together for a lump sum, and the buyer brought suit for damages for fraudulent representations with reference to the land only, testimony concerning the value of the personal property was admissible to arrive at the contract price of the land.—Koch v. Rhodes, 447.

Same—Crops Produced—Fraudulent Statement of Fact—Evidence—Admissibility.

5. A statement alleged to have been made by defendant for the purpose of inducing plaintiff to buy agricultural land, that he (de-

fendant) had never cut less than 200 tons of hay and had cut more, was not a mere expression of opinion but a statement of fact and as such admissible in evidence.—Koch v. Rhodes, 447.

Evidence—Admissibility.

6. To prove the falsity of the statement referred to in paragraph 5 above, plaintiff was rightly permitted to show that the land, though properly cultivated, produced but fifty tons of hay in what was deemed a very good year for hay.—Koch v. Rhodes, 447.

Latitude of Proof Permissible.

7. Where fraud is alleged, great latitude of proof is allowed, and every fact or circumstance from which a legal inference of fraud may be drawn is admissible.—Koch v. Rhodes, 447.

Same—False Representations—Knowledge in Vendor—Evidence—Admissibility.

8. Statements made to a third person by defendant in attempting to secure a loan for plaintiff about the time the contract of sale between the parties was made, tending to show that he knew that representations he had made to plaintiff were false, were admissible, the fact that he acted as agent of plaintiff not rendering them inadmissible.—Koch v. Rhodes, 447.

Same—When Vendee may Rely on Fraudulent Representations.

9. While one intending to buy has no right to rely on representations as to condition, quality, or character of property where the parties stand on an equal footing, the contrary is true where the parties have not equal knowledge, and he to whom the representations are made has no opportunity to examine the property, or where he is fraudulently induced to forego investigation.—Koch v. Rhodes, 447.

Same—Case at Bar.

10. *Held*, under the above rule, that plaintiff was warranted in accepting defendant's representations as to the physical condition of the surface of a meadow where the former was advised by the latter that it would be impossible to inspect it without the use of rubber boots and that none were available, and as to the character of land lying across a river, upon defendant's false assertion that he had no boat at hand to make inspection possible.—Koch v. Rhodes, 447.

Same—*Caveat Emptor*—When Rule not Applicable.

11. The strict rule of *caveat emptor* does not apply where fraud entered into the transaction.—Koch v. Rhodes, 447.

Same—Varying Terms of Writing—Evidence—Admissibility.

12. Where land was described by government subdivisions in the contract of sale, without reference to the number of acres embraced in the tract, evidence of oral representations made to the buyer by the seller, prior to its execution, that it contained a greater acreage than it actually did, was admissible for the purpose of showing fraud in the inception of the contract, and was not objectionable as varying the terms of the writing.—Koch v. Rhodes, 447.

Same—Remedies of Vendee.

13. A party who has been fraudulently induced to enter into a contract may either rescind, or elect to carry it out and recover damages suffered by reason of the fraud, unless he waives such right. Koch v. Rhodes, 447.

Same—Right of Action—Waiver—Intent.

14. By the affirmance of a contract one may waive his right to rescind as well as his right of action for damages on account of fraud practiced upon him to induce him to enter into it, but it is

only when the intention to waive is clearly manifested that a waiver will be declared.—Koch v. Rhodes, 447.

Same—What Does not Constitute Waiver.

15. *Held*, that plaintiff's action in making a partial payment on the purchase price of the land under an alleged fraudulent contract, after commencement of suit for damages, did not amount to a waiver of his right to recover, where he notified defendant seller that the payment, then due, was made without waiver.—Koch v. Rhodes, 447.

FREE SPEECH AND FREE PRESS.

See Constitution, 17, 18.

GOODWILL.

Nature of Property.

1. Goodwill is an incident to and inherent in the business to which it attaches.—Wylie v. Wylie Permanent Camping Co., 115.

Corporations—Nature of Property.

2. The goodwill of a corporation is an intangible asset dependent on the corporate existence; it constitutes an element of value in connection with, but not apart from, the corporation and its business.—Wylie v. Wylie Permanent Camping Co., 115.

Same—Interest of Stockholder in.

3. *Semble:* It would seem that a stockholder has no interest in the goodwill of his corporation which he can sell.—Wylie v. Wylie Permanent Camping Co., 115.

Same—Effect of Sale of Stock.

4. *Held*, under the above rules, that by the sale of his stock in a corporation a stockholder transferred to the buyer whatever corporate goodwill he possessed; hence he was not in position to maintain an action for breach of a contract under which he was to receive $1,500 for the goodwill of the business.—Wylie v. Wylie Permanent Camping Co., 115.

HARMLESS ERROR.

Admission and refusal of evidence,—see Evidence, 2, 34, 41.

Confirming irregular action of executor,—see Appeal and Error, 16.

Courts must disregard procedural irregularities,—see Technicalities, 1.

Erroneous instructions,—see Instructions, 5–7.

HOMICIDE.

See Criminal Law, 35, 36.

HUSBAND AND WIFE.

Marriage—Annulment—No Statutory Authority for Granting Temporary Alimony.

1. *Held*, that in an action for the annulment of marriage on the ground of defendant wife's physical incapacity, there is no statutory authority for allowing her alimony *pendente lite*, attorney's fees and suit money.—State ex rel. Wooten v. District Court, 517.

Same—Power of District Court to Grant Temporary Alimony.

2. *Held*, that though the district court has no statutory authority to do so, it may, under its equity jurisdiction in such matters, grant temporary alimony, attorney's fees and suit money to the wife in a suit by the husband for the annulment of the marriage

on the ground of her physical incapacity, such power continuing during the pendency of the suit in the district court or in the supreme court on appeal.—State ex rel. Wooten v. District Court, 517.

GAMING.

See Criminal Law, 1, 2.

INDEBTEDNESS.

Counties—Special election—Notice—Sufficiency,—see Elections, 13.

INDEPENDENT CONTRACTORS.

Liability of owner of city property for maintenance of nuisance in operating stone quarry thereon through independent contractor,—see Nuisances, 3.

INDIANS.

Allotments of Land in Severalty—Citizenship—Rights Acquired.

1. *Held*, that an Indian who had severed his tribal relations and acquired an allotment of land under the Act of Congress of June 5, 1872 (17 Stats. at Large, p. 226), became a citizen of the United States upon approval of the Act of February 8, 1887 (24 Stats. at Large, p. 390), and entitled to institute or defend actions of ejectment or trespass in state or federal courts, regardless of the prohibition against the alienation of the land obtained under the allotment.—Smith v. Northern Pacific Ry. Co., 14.

INFORMATIONS.

Charging sedition—Sufficiency,—see Criminal Law, 34.

Charging violation of liquor law—Sufficiency,—see Criminal Law, 23.

Charging separate offenses — Election — Appeal and error, — see Criminal Law, 15.

Insufficiency—Failure to demur—Waiver—Motion in arrest,—see Criminal Law, 22.

Reading to jury—Refusal—Error,—see Criminal Law, 25.

INITIATIVE AND REFERENDUM.

See Constitution, 2–6.

INJUNCTION.

County indebtedness—Special election,—see Elections, 13.

INSTRUCTIONS.

Mortality and Annuity Tables—Not to be Viewed as Definite Standard for Awarding Damages.

1. *Held*, that an instruction from which the jury could infer that they were at liberty to regard mortality and annuity tables as furnishing an authorized and definite standard by which they might fix their award in a personal injury action, was prejudicially erroneous.—Cornell v. Great Northern Ry. Co., 177.

Personal Injuries—Physical Examination of Plaintiff.

2. An instruction that plaintiff's refusal to submit to a physical examination in the presence of the jury might be considered by them and given such weight as they might in their discretion deem proper, *held* properly refused, the defendant, under *May* v. *Northern*

Pac. Ry. Co., 32 Mont. 522, not having any right to demand such an examination.—Cornell v. Great Northern Ry. Co., 177.

How to be Considered.

3. The instructions to the jury must be considered in the light of the issues and the evidence, every paragraph being read with the context and as constituting the single charge of the court.—Surman v. Cruse, 253.

Abstract Propositions of Law.

4. Abstract propositions of law should not be submitted to the jury in the instructions of the court.—Surman v. Cruse, 253.

Erroneous Instruction—When Harmless.

5. Though an instruction is erroneous in the sense that it is incomplete, the error becomes harmless if it is supplemented and made complete by other instructions given.—Surman v. Cruse, 253.

Same.

6. For errors in instructions not affecting appellant's substantial rights, a judgment will not be reversed.—Surman v. Cruse, 253.

Same—When not Ground for Reversal of Judgment.

7. Under section 6746, Revised Codes, for error in an instruction which was not specifically pointed out and excepted to at the settlement of the instructions, the supreme court may not reverse a judgment.—Surman v. Cruse, 253.

Criminal Law—Effect of Seditious Utterances—Jury Question.

8. The question whether the natural tendency and reasonably probable effect of alleged seditious utterances was to incite or inflame resistance to duly constituted federal or state authority in connection with the prosecution of the war, was a question for the jury, and failure to so charge was error.—State v. Smith, 349.

Same—Settlement—Failure to Make Objections—Effect.

9. Where counsel for defendant on the settlement of the instructions made no objection to those proposed to be given, he adopted the theory of the court, and could not thereafter put it in error by showing that certain of the instructions were erroneous, or by charging improper refusal to give others on an opposite theory.—State v. Smith, 349.

Same—Proper Refusal.

10. On a trial for sedition, an instruction that in order to convict the jury must find that the utterances proved were seditious was properly refused.—State v. Smith, 349.

Sedition—Intent—Instructions.

11. Since intent is not an ingredient of the crime of sedition consisting of the publication of an objectionable article in a newspaper, refusal of instructions embodying the provisions of sections 8112 and 8113, Revised Codes, relative to union of act and intent and how intent may be manifested, was proper.—State v. Smith, 563.

Same.

12. *Held*, that it was error to instruct the jury in a prosecution for publishing a seditious article, that, the state having proven that the law had been violated, guilty intent is conclusively presumed, since it included the intent to publish the article which was immaterial, and did not limit it to the intent presumed from a publication likely to incite and inflame resistance to duly constituted federal or state authority.—State v. Smith, 563.

Same—Officer of Corporation—Defense—Instruction—Proper Refusal.

13. An instruction that failure of defendant, vice-president of a publishing company, to prevent the publication of a seditious article,

was not sufficient to render him criminally responsible, was properly refused, mere failure to act not being sufficient to exonerate him.—State v. Smith, 563.

Abstract Propositions.

14. The giving of an abstract proposition of law, not based upon the issues or facts supported by the evidence, is error.—State v. Smith, 563.

Sedition—Conviction for Crime Other Than Charged—Erroneous Instruction.

15. Defendant having been charged with publishing a certain seditious article, directed against the state council of defense, it was error to charge the jury that they could adjudge him guilty if they found that he uttered, wrote or printed *any* language at any time between two dates covering a period of seven months calculated to incite or inflame resistance *to any* duly constituted state authority, *etc.*, in the absence of an instruction limiting it to the particular act charged against defendant, and no evidence appearing in the record to show that he wrote or printed the article in question.—State v. Smith, 563.

To be Viewed as Whole.

16. Instructions must be examined in their entirety, and where as a whole they correctly state the law, and where those instructions general in their nature are by specific instructions limited to the facts in the case, error cannot be predicated on an incomplete or a too general instruction.—State v. Smith, 563.

Criminal Law—Instructions—How to be Framed.

17. An instruction in a criminal prosecution should be so explicit and so closely connected with the facts of the case as to enable the jury to apply the law to the facts.—State v. Smith, 563.

INSURANCE.

Contracts—Commissions—When not Due.

1. Where, under a contract between a life insurance company and its agents, the latter were to receive as compensation only such commissions as should be included in premiums collected and paid to the company during the period of their employment, they were not entitled to commissions on premiums after they had left the company's employ.—Pearce v. Metropolitan Life Insurance Co., 79.

"Rebating" a Misdemeanor.

2. A fire insurance solicitor who, pursuant to an agreement with an agent of the owner of a business block, paid over to the agent two-thirds of the commission earned by him in writing the insurance upon such block, was guilty of "rebating," an act made a misdemeanor by section 4028, Revised Codes.—Smith v. Kleinschmidt, 237.

INTEREST.

Eminent Domain—Judgment—Compound Interest.

1. A judgment in condemnation proceedings arrived at by deducting from the amount awarded to the owner of the land taken the sum paid into court at the time the plaintiff railroad company was let into possession, computing interest upon the balance so ascertained from that date to the date of entry of judgment and adding it to such balance, the sum total to bear interest at eight per cent per annum until paid, was not objectionable as allowing compound interest.—Gallatin Valley Elec. Ry. v. Nieble, 27.

INTERVENTION.

Mechanics' Liens—Right Dependent upon What.

1. The right of one to intervene in a suit to foreclose a mechanic's lien is dependent upon the existence of a valid lien and the interest he thereby has in the subject matter of the action commenced by plaintiff; hence where intervener's notice of lien was so defective as not to support the lien, a demurrer to the complaint in intervention was properly sustained even though it stated a cause of action on contract.—Interstate Lumber Co. v. Magill-Nevin P. & H. Co., 334.

INTOXICATING LIQUORS.

Sale—Information—Sufficiency,—see Criminal Law, 23.

Sale of, by attorney—Disbarment,—see Attorney and Client, 1.

Confiscation—New Trial.

1. The search and seizure statute (Prohibition Enforcement Act, Chap. 143, Laws 1917), not making provision for a new trial, and the general statutes covering new trials being inapplicable, the unsuccessful claimant of seized liquors was not entitled to a new trial. State v. Kelly, 123.

Seizure—Question Determinable.

2. The question for determination in a proceeding under Chapter 143, Laws of 1917, is whether any of the articles seized were used, kept or possessed by any person with the intention of violating the prohibitory liquor law.—State v. Kelly, 123.

Search and Seizure Statute—Nature of Judgment.

3. Anyone making the required claim of ownership to seized liquors becomes a party to the proceeding instituted under Chapter 143, Laws of 1917, to the extent that he may appeal from a judgment of forfeiture, the determination by the court not, however, being in any sense an adjudication of title as between conflicting claimants. State v. Kelly, 123.

Same—Nature of Proceeding.

4. The proceeding instituted under the search and seizure statute is one *in rem* against the seized liquors for their condemnation as forfeited property, is of purely statutory origin and summary in character.—State v. Kelly, 123.

Confiscation—Jury Trial.

5. The party claiming liquors seized under the provisions of Chapter 143, Laws of 1917, is not entitled to trial by jury.—State v. Kelly, 123.

Costs—How Paid.

6. *Held*, that since Chapter 143, above, does not provide that the costs of the proceeding incident to the seizure of contraband liquors may be taxed against the party claiming them, it is error to so tax them.—State v. Kelly, 123.

Same.

7. *Held*, under section 13 of Chapter 143, Laws of 1917, that if costs are recoverable in a proceeding of the nature of the above, they must be paid by the county from the sale of the property seized, provided any of such property is of the character which may be sold.—State v. Kelly, 123.

Search-warrant—Complaint—Fatal Variance—Dismissal.

8. Where the complaint in proceedings under the Search and Seizure Act (Chap. 143, Laws 1917) alleged that defendant had contraband liquors deposited at No. 601 on a certain street, and a search-warrant

was issued to search such premises, and the officer searched the premises at No. 603 on that street, seizing, among other things, a small amount of liquor, the departure was fatal to the validity of the proceedings, and a judgment of dismissal was proper.—State v. Malarky, 132.

Enforcement Act—Issues—Trial.

9. The question primarily involved in a proceeding under the Prohibitory Enforcement Act, Chap. 143, Laws 1917, is whether or not the liquors seized as contraband were kept or possessed by any person with the intention of violating the prohibition laws of the state, the question of their ownership being merely incidental.—State v. Nielsen, 137.

Searches and Seizures—*Prima Facie* Case—Burden of Proof.

10. In proceedings of the nature of the above, the affidavit upon which the search-warrant is issued and the possession of the liquors at the time of their seizure are *prima facie* evidence of their contraband character, the burden then resting upon the claimant to show his property right and interest therein and that they were not used, kept or possessed, with the intention of violating the prohibition laws.—State v. Nielsen, 137.

Destruction—Evidence—Sufficiency.

11. The purchase of liquor costing $980 by one living in a single room at a hotel, the liquor being in pint bottles and stored in a closet packed in gunny-sacks, filling the closet almost to the ceiling, with scarcely room for wearing apparel, with other facts and circumstances, *held* sufficient to justify the court in disregarding the claimant's testimony and ordering the liquor destroyed.—State v. Nielsen, 137.

JUDGMENTS.

In condemnation proceedings,—see Interest, 1.

Default Judgments—Setting Aside—When Proper.

1. Where affidavits accompanying a motion to set aside a judgment by default, filed within ten days after its entry, showed that defendants' attorney had prepared a demurrer and intended to file it within the time allowed by statute, but on account of important business engagements elsewhere failed to do so; that during his absence and upon recalling the fact that he had not filed it, he advised one of defendants by letter where the demurrer could be found in his office, with directions to file it, *etc.*, an answer being tendered with the affidavits, the district court did not abuse its discretion in granting the motion.—Farmers' Co-operative Association v. Roper, 42.

Same—Answer—General Denials—Affidavits of Merits.

2. The fact that the verified answer filed by defendants with their motion to set aside their default consisted of general denials was not a ground for denying the motion, where three affidavits of merits setting forth substantial facts which, if true, constituted a complete defense to the action, were also filed, the answer itself being a sufficient affidavit of merits. (On Motion for Rehearing.)—Farmers' Co-operative Association v. Roper, 42.

Same—Appeal.

3. The supreme court is less inclined to reverse an order granting than one refusing an application to open a default. (On Motion for Rehearing.)—Farmers' Co-operative Association v. Roper, 42.

Intoxicating Liquors—Search and Seizure Statute—Nature of Judgment.

4. Anyone making the required claim of ownership to seized liquors becomes a party to the proceeding instituted under Chapter 143, Laws of 1917, to the extent that he may appeal from a judgment of forfeiture, the determination by the court not, however, being in any sense an adjudication of title as between conflicting claimants.—State v. Kelly, 123.

Failure of Indorsement of Attorney's Name—Insufficient Ground for Vacation of Default Judgment.

5. *Held*, on application for writ of supervisory control to annul an order vacating a default judgment made because the name of plaintiff's attorney had not been indorsed on the summons, that defendant having been served with a copy of the complaint upon which appeared the name of such attorney and, in pursuance of the knowledge thus gained, discussed a compromise of the case with him, the substantial rights of defendant were not injuriously affected by the omission, and that vacation of the judgment was error.—State ex rel. Jerry v. District Court, 328.

When Void.

6. A judgment is void only when upon inspection of the judgment-roll it is apparent that the court either did not have jurisdiction or has committed an act in excess of its jurisdiction.—State ex rel. Thompson v. District Court, 433.

Default Judgment—Vacation—When Error.

7. Vacation of a decree of divorce, rendered upon default after publication of summons, on the ground of fraud on the part of plaintiff, after a lapse of more than fifteen months from its rendition, *held* error, defendant's remedy being an action in equity to set the decree aside on the ground stated.—State ex rel. Thompson v. District Court, 433.

JUDICIAL NOTICE.

See Evidence, 5.

JURISDICTION.

Of supreme court,—see Appeal and Error, 14.

To order special improvement,—see Cities and Towns, 6.

To try criminal cause,—see Constitution, 19.

JURY.

See, also, Instructions.

Conflict in evidence—Negligence—Jury question,—see Railroads, 8.

Impartial jury—Constitution,—see Criminal Law, 28.

Jury Trial—Constitution.

1. The right of trial by jury in the classes of cases in which it existed at the time the state Constitution was adopted remains inviolate and is secured to all; in all other cases the legislature may provide for a trial or hearing, without a jury.—State v. Kelly, 123.

Intoxicating Liquors—Confiscation—Jury Trial.

2. The party claiming liquors seized under the provisions of Chapter 143, Laws of 1917, is not entitled to trial by jury.—State v. Kelly, 123.

Equity—Jury Trial.

3. In an equity case the trial judge may, but is not bound to, call a jury; where a jury is called, he may disregard their findings and substitute his own.—Bosantz v. Ostronich, 197.

Criminal Law—Reading Information to Jury—Refusal—Error.

4. In a prosecution for sedition for distributing a pamphlet containing statements the nature and probable effect of which was alleged to have been the obstruction of the national draft law, refusal to permit defendant's counsel to read the information and a copy of the pamphlet to the jurors as a basis of their *voir dire* examination was error.—State v. Brooks, 480.

Same—Purpose of *Voir Dire* Examination—Nature of Right.

5. The *voir dire* examination of jurors is a right secured to defendant by statute, its purpose being to ascertain whether there exist grounds for challenge for cause, and to enable counsel to exercise intelligently the peremptory challenges allowed by law.—State v. Brooks, 480; State v. Smith, 563.

Same—Refusal of Challenge—When Error.

6. If an objectionable juror is forced upon a defendant after he has exhausted his peremptory challenges, a ruling of the court denying a challenge for cause as to such juror will constitute reversible error, if the challenge should have been sustained.—State v. Brooks, 480.

Same—Prejudiced Juror—Refusal of Challenge—Error.

7. A juror who testified on his *voir dire* examination that he entertained a bitter prejudice against the Industrial Workers of the World and against every member of it, which would abide with him throughout the trial, that it would require evidence to remove the prejudice, and less evidence to convict defendant, who was a member of the organization, than if he were not a member, was not an impartial juror, and refusal to grant a challenge for cause was error.—State v. Brooks, 480.

Same—Selection of Jury—Failure to Observe Statute—Effect.

8. The fact that the evidence is sufficient to establish the guilt of one accused of crime, cannot be held to have rendered harmless the failure of the court to observe the law in selecting the jury to try him.—State v. Brooks, 480.

Criminal Law—*Voir Dire* Examination—Benefit of Doubt—Erroneous Exclusion of Proper Question.

9. In a prosecution for sedition, the defendant being charged with the publication of an article in a newspaper which was calculated to incite or inflame resistance to the state council of defense in connection with the prosecution of the war, refusal to permit a juror on his *voir dire* examination to answer the question whether, if there was a reasonable doubt in his mind as to whether or not the article was calculated to incite or inflame resistance, *etc.*, he would acquit defendant, was error, in the absence of an instruction that he could be convicted only if the jury found beyond a reasonable doubt that the statement was calculated to incite or inflame resistance to constituted authority.—State v. Smith, 563.

Same—Assumption of Fact as Proven—Error.

10. In a criminal cause, the district court cannot take from the jury or assume as proven, any essential fact, no matter how conclusive the evidence may appear to be.—State v. Smith, 563.

JUSTICES OF THE PEACE.

Costs in Justice's Court—Taxable in District Court.

1. *Held*, that sections 7083 and 7124, Revised Codes, impliedly authorize the district court to tax against the unsuccessful party in that court the costs incurred in the trial of the cause in the justice's

court, where they were included in the cost bill, although the justice of the peace had failed to make entry of costs on his docket.—Duckett v. Biggs, 443.

LEASES.

Liability of lessor and lessee for nuisance maintained on city property,—see Nuisances, 1–3.

Ambiguity—Evidence.

1. Where the terms of a lease are ambiguous, the circumstances under which it was made and the intention of the parties in entering into it are proper subjects of inquiry.—Duckett v. Biggs, 443.

LEGISLATURE.

See, also, Constitution; Statutes and Statutory Construction.

Statutes—Irregularity in Legislative Proceedings—Extent of Review of Journals.

1. Under the rule that where the constitutionality of an Act is questioned on the ground of irregularity in its passage, the only purpose for which courts may go behind the enrolled bill is to ascertain whether the aye and no vote was entered in the journals of the legislative assembly, it is not permissible to determine whether an amendment to a bill made by a joint conference committee was considered by either house before passage upon third reading.—State ex rel. Woodward v. Moulton, 414.

LIBEL AND SLANDER.

Truth of Statement a Defense.

1. The truth of the statement by defendant that plaintiff, while acting as a fire insurance agent, was guilty of rebating, having been established, it constituted a defense to an action for slander, and the court erred in refusing to direct a verdict in favor of defendant. Smith v. Kleinschmidt, 237.

Sedition—Rules in Libel Cases not Applicable.

2. Though based upon utterances as are libel cases the crime of sedition is not governed by the rules in such cases, in which the jury is the judge of both the law and the fact.—State v. Smith, 349.

LICENSE.

Duty owing by railroads to licensees,—see Personal Injuries, 3–5.

LIQUIDATED DAMAGES.

See Damages, 1.

LIVESTOCK.

Railroads—Failure to fence tracks,—see Railroads, 1–3.

Railroads—Failure to stop and feed,—see Railroads, 4–9.

LOST INSTRUMENT.

See Deeds, 1–4.

MALICIOUS PROSECUTION.

Evidence—Insufficiency.

1. Where the evidence in an action for malicious prosecution of plaintiff on a charge of cattle stealing showed that the county attorney had acted upon his own initiative, after a careful investiga-

tion and without consulting or advising with defendants, a directed verdict in favor of the latter was proper.—Caddel v. Brown, 266.

MANDAMUS.

When Writ Does not Lie.

1. *Mandamus* does not lie to compel the district court to restore matter stricken from pleadings, where the party seeking relief had asked for and secured time to file amended pleadings, thus treating the original ones as *functus officio* and leaving nothing to which restoration could be made.—State ex rel. Juckem v. District Court, 315.

New Counties—Board of County Commissioners—Availability of Writ.

2. *Mandamus* lies to compel the board of commissioners of a county from which the greater portion of a proposed new county is intended to be taken to reconvene and take jurisdiction of the proceeding, where its refusal to proceed was based upon an erroneous decision of purely preliminary questions of law.—State ex rel. Woodward v. Moulton, 414.

State Auditor—Powers—Attorney General—Scope of Duties—State Efficiency and Trade Commission—Assistants—Compensation.

3. Chapter 184, Laws 1919, authorizes the state efficiency and trade commission to employ persons skilled in the science of state and municipal government to aid it in its investigations. The relator was appointed to prepare for its use a survey of all the state offices, bureaus, *etc.*, as well as a concise digest of the laws governing them. The relator's claim for compensation was approved, but the state auditor declined to draw his warrant for the amount of the claim on the ground that the services performed by the relator were such as are required to be performed by the attorney general. *Held*, on *mandamus*, that the duties of the attorney general as defined by the Constitution, the statutes and the common law, in so far as it is in force in Montana, do not include the rendition of the services performed by relator; that under the Act creating it, the commission is clothed with a wide discretion in carrying its provisions into effect, and that, in the absence of fraud or manifest abuse thereof in the employment of relator, the state auditor was without power to refuse to issue a warrant.—State ex rel. Pew v. Porter, 535.

MARRIAGE.

Annulment—Temporary alimony,—see Husband and Wife, 1, 2.

MASTER AND SERVANT.

See Personal Injuries, 1–26.

MECHANICS' LIENS.

Compliance With Statutory Requirements Necessary to Validity.

1. While the mechanic's lien statute is remedial, its requirements must be complied with.—Interstate Lumber Co. v. Magill-Nevin P. & H. Co., 334.

Defective Notice—Error in Name of Owner of Property.

2. A notice of a mechanic's lien claim which instead of setting forth the name of the owner of the property sought to be charged, stated that the lienor was the owner, was fatally defective.—Interstate Lumber Co. v. Magill-Nevin P. & H. Co., 334.

Validity—How Tested.

3. The validity of a mechanic's lien must be tested by the description contained in it, and it is only in case of ambiguity that it may be explained and the property indentified by oral evidence.—Interstate Lumber Co v. Magill-Nevin P. & H. Co., 334.

Intervention—Dependent upon What.

4. The right of one to intervene in a suit to foreclose a mechanic's lien is dependent upon the existence of a valid lien and the interest he thereby has in the subject matter of the action commenced by plaintiff; hence where intervener's notice of lien was so defective as not to support the lien, a demurrer to the complaint in intervention was properly sustained even though it stated a cause of action on contract.—Interstate Lumber Co. v. Magill-Nevin P. & H. Co., 334.

MINES AND MINING.

See, also, Personal Injuries, 20–26; Trusts, 1, 2.

Purpose of Certificate of Location.

1. The purpose of a recorded certificate of location of a quartz lode mining claim is to impart to subsequent locators constructive notice of the existence of the claim, its location and extent.—Heilman v. Loughrin, 380.

Defects in Certificate of Location—When Immaterial.

2. As to parties who had actual notice of the location and boundaries of a mining claim when they relocated it, defects in a recorded certificate of location filed by the original locator must be deemed immaterial.—Heilman v. Loughrin, 380.

Relocation—Defective Certificate of Location—Estoppel.

3. One claiming under a relocation of mining ground by virtue of a prior locator's forfeiture impliedly admits the validity of the prior location and is estopped to assert defects in the certificate of location in an action to quiet title.—Heilman v. Loughrin, 380.

Quieting Title—Plaintiff Successful in Part—Costs—Discretion.

4. The disposition of the question of costs in an action to quiet title to two quartz lode mining claims, in which plaintiff prevailed as to one claim and defendants as to the other, *held* to have been within the sound, legal discretion of the trial court (Rev. Codes, sec. 7156), with whose action in allowing costs to plaintiff only the supreme court will not interfere in the absence of a showing of a manifest abuse of discretion.—Heilman v. Loughrin, 380.

MORTALITY TABLES.

See Evidence, 6, 8; Instructions, 1.

MORTGAGES.

Chattel Mortgages—Promissory Notes—Liability of Person Signing Note but not Mortgage.

1. *Held*, that where a husband and wife delivered at the same time a note and a chattel mortgage securing its payment in order to obtain a loan, the wife doing so with full knowledge of and consent to the entire transaction, she was bound by a stipulation in the mortgage granting the mortgagee the option to accelerate payment of the note, whenever it was deemed necessary for the security of the loan, though the instrument did not bear her signature.—Union Bank & Trust Co. v. Himmelbauer, 438.

Action to Compel Release—Intention of Parties—Parol Evidence—Admissibility.

2. In an action seeking the release of a mortgage, parol evidence was admissible to show that in addition to the sum of money mentioned in it as being secured by it, it was intended to secure future advances by the mortgagee to the mortgagor, as well as to secure defendant company's president against personal liability on a promissory note made to a third person for the benefit of the mortgagor.—Noyes Estate v. Granite-Alaska Co., 511.

MOTIONS.

In arrest—Insufficiency of information,—see Criminal Law, 22.

To strike portion of pleading—Effect,—see Pleading and Practice, 18.

MUNICIPAL CORPORATIONS.

See Cities and Towns; Counties.

MURDER.

See Criminal Law, 35, 36.

NEGLIGENCE.

See, also, Personal Injuries.

Railroads killing livestock—Presumptions,—see Railroads, 2, 3.

In transportation of livestock,—see Railroads, 4–9.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW COUNTIES.

See Counties, 2–8.

NEWSPAPERS.

Circulation,—see Evidence, 48.

Publication of seditious article,—see Criminal Law, 38–50.

NEW TRIAL.

Insufficiency of Evidence—Discretion.

1. A motion for a new trial on the ground of insufficiency of the evidence is addressed to the sound legal discretion of the trial court, not to be disturbed on appeal except for a clear abuse thereof.—Brange v. Bowen, 77.

Intoxicating Liquors—Confiscation.

2. The search and seizure statute (Prohibition Enforcement Act, Chap. 143, Laws 1917), not making provision for a new trial, and the general statutes covering new trials being inapplicable, the unsuccessful claimant of seized liquors is not entitled to a new trial.—State v. Kelly, 123.

Newly Discovered Evidence—Affidavits to be Considered Together.

3. An affidavit made in support of a motion for a new trial on the ground of newly discovered evidence, and a second one made by the same affiant procured by the adverse party withdrawing or modifying statements in the first, must be considered together.—Surman v. Cruse, 253.

Cumulative Evidence not Ground for New Trial.

4. Cumulative evidence affords no ground for a new trial on the ground of newly discovered evidence.—Surman v. Cruse, 253.

Newly Discovered Evidence—When not Ground for New Trial.

5. Where alleged newly discovered evidence could only be employed in rebuttal to repel the imputation of contributory negligence in a particular not charged, and had no relevancy to the cause of action stated in the complaint, a new trial on the ground of newly discovered evidence was properly denied.—Surman v. Cruse, 253.

Same—Affidavit by Party Aggrieved Necessary.

6. Where a new trial is asked on the ground of newly discovered evidence, the moving party should show by his own affidavit that the new evidence was not known to him at the time of the trial and could not with reasonable diligence have been discovered and produced by him at that time.—State v. Prlja, 461.

Same—Insufficient Affidavit.

7. An affidavit of one of defendant's attorneys in support of a motion for a new trial asked because of newly discovered evidence, to the effect that he could not with reasonable diligence have discovered the affidavits of five persons who claimed to have been present at the place where the alleged assault occurred and whose testimony would tend to contradict the state's witnesses or corroborate appellant's version of the affray, "and presented same upon the trial," was insufficient to show abuse of the court's discretion in denying the motion.—State v. Prlja, 461.

Manner of Conducting Trial—Remarks of Judge—Cause for New Trial.

8. Remarks of the judge during the progress of a criminal trial and the manner of conducting it may be such as to indicate to the jury that he is prejudiced against defendant and deprive him of a fair trial, necessitating a reversal of the judgment of conviction.—State v. Brooks, 480.

NONAPPEALABLE ORDERS.

See Appeal and Error, 19.

NONSUIT.

Presumptions.

1. On motion for nonsuit, every fact is deemed to be proved which the evidence tends to establish, and if, viewed in the light most favorable to plaintiff, it makes out a *prima facie* case, it is error to grant the motion.—Sprinkle v. Anderson, 223.

When Proper.

2. A case should not be withdrawn from the jury unless as a matter of law recovery cannot be had in any view of the evidence, including legitimate inferences to be drawn from it.—Sprinkle v. Anderson, 223.

NOTICE.

Property owners in cities and towns chargeable with knowledge that resolution of intention to create special improvement district is required to be on file in clerk's office,—see Cities and Towns, 9.

Notice of claim of loss to carrier,—see Railroads, 8.

Of special county election,—Sufficiency,—see Elections, 13.

NUISANCES.

Stone Quarry Within City Limits.

1. Where, in an action to enjoin the operation of a rock quarry and rock-crusher in the residential part of the city, the evidence showed that in spite of precaution taken in their operation rocks escaped and were thrown against plaintiff's house and the concussion from blasting was so violent as to shake the house, and dust from the crusher and elevator entered the house in such quantities as to render it unfit for habitation, the maintenance of a nuisance was established.—Fagan v. Silver, 427.

Same—Liability of Lessor and Lessee.

2. One who erects a nuisance on his premises cannot escape liability by leasing them, his liability extending to the continuance of the nuisance after the lease goes into effect; the lessee also being liable if he continues the nuisance after notice of its existence and notice to abate it.—Fagan v. Silver, 427.

Same—Independent Contractor—Liability of Owner.

3. The owner of a stone quarry and crusher, constituting a nuisance, cannot escape liability for damage to adjoining property by contracting for their operation by an independent contractor, who was to deliver the crushed rock in bins, for the use and benefit of the owner, at a stipulated price per yard.—Fagan v. Silver, 427.

OFFER OF PROOF.

Improper refusal,—see Evidence, 44.

OFFICERS.

Assessors—Special deputies—Compensation,—see Counties, 1.

Salaries—Increase—Purpose of Constitutional Limitations.

1. The purpose of the constitutional limitations (Art. V, sec. 31, Art. VII, sec. 4, Art. VIII, sec. 29) against the passage of laws increasing or diminishing the salaries of certain public officers during the terms for which they were elected, is to remove the temptation from the legislature to control the executive and judicial branches of government by promises of reward in the form of increased compensation or threats of punishment by way of reduced salaries.—State ex rel. Jackson v. Porter, 343.

Same—Enforcement of Constitutional Limitations.

2. The rule established by the above constitutional limitations must be strictly enforced, provided the reason underlying it is present; whenever the reason for it ceases, so does the rule itself.—State ex rel. Jackson v. Porter, 343.

Same—District Judges—Who Entitled to Increase.

3. *Held*, that while under the constitutional limitations above (paragraph 1) a district judge elected prior to, and serving at the time of, the passage of an Act increasing the salary of the office, would not have been entitled to the increase, his successor appointed to fill the vacancy created by the former's resignation some seven months after its passage, could rightfully demand the enlarged compensation, the circumstances removing the case from the operation of the rule referred to in paragraph 1 above. (MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HURLY dissenting.)—State ex rel. Jackson v. Porter, 343.

ORDERS.

Nonappealable,—see Appeal and Error, 19.

PARDONS.

Contract between attorney and client to procure pardon,—**see Contracts, 15, 18.**

PAROL EVIDENCE.

See Evidence, 32, 38, 42.

PARTIAL DEFENSES.

See Pleading and Practice, 7.

PLEADING AND PRACTICE.

Trial—Reopening Case—Discretion.

1. A motion to reopen a case after closing of the testimony and settlement of the instructions, for the purpose of offering a writing in evidence, is addressed to the sound legal discretion of the trial court.—Brange v. Bowen, 77.

New Trial—Insufficiency of Evidence—Discretion.

2. A motion for a new trial on the ground of insufficiency of the evidence is addressed to the sound legal discretion of the trial court, not to be disturbed on appeal except for a clear abuse thereof.—Brange v. Bowen, 77.

Claims Against Estate—Disallowance of Claim—Action—Complaint.

3. Where a claim against an estate is disallowed by the executor or administrator, the suit brought by the claimant must be upon the identical claim presented for payment.—Harwood v. Scott, Admx., 83.

Same—Presentation of Claim—Sufficiency.

4. If the presentation of a claim against an estate, which was rejected, advised the executor or administrator of its nature, the amount claimed, and was explicit enough to bar another action on the same demand, it was sufficient; an observance of the technical rules of pleading not being required.—Harwood v. Scott, Admx., 83.

Same—Complaint—Variance—What Does not Constitute.

5. Where the only difference between a claim presented to and rejected by an administrator, and the complaint in an action on the rejected claim, was one of phraseology and not of substance, the district court was not warranted in dismissing the action on the ground of fatal variance between the claim and the complaint.—Harwood v. Scott, Admx., 83.

Intoxicating Liquors—Search-warrant—Complaint—Fatal Variance—Dismissal.

6. Where the complaint in proceedings under the Search and Seizure Act (Chap. 143, Laws 1917) alleged that defendant had contraband liquors deposited at No. 601 on a certain street, and a search-warrant was issued to search such premises, and the officer searched the premises at No. 603 on that street, seizing, among other things, a small amount of liquor, the departure was fatal to the validity of the proceedings, and a judgment of dismissal was proper.—State v. Malarky, 132.

Personal Injuries—Contributory Negligence—Partial Defense—Must be Pleaded.

7. Under the rule of comparative negligence declared by Chapter 29, Laws of 1911, contributory negligence on the part of plaintiff is a partial defense which must be pleaded.—Cornell v. Great Northern Ry. Co., 177.

Same—Employers' Liability Act—Pleadings.

8. The Employers' Liability Act (Chap. 29, Laws 1911), does not change in any particular the form of the statement of plaintiff's cause of action from that at common law, but does require all the other pleadings to be so formulated as to present the issues arising upon defenses permitted by it, including the matter which may be alleged in mitigation of damages.—Cornell v. Great Northern Ry. Co., 177.

Practice—Where Evidence not Part of Bill of Exceptions—How Made Part of Record on Appeal.

9. Where a transcript of the stenographer's notes of the evidence, not made a part of a bill of exceptions, is sought to be made available on appeal under the provisions of Chapter 149, Laws of 1915, it must be certified as correct by the trial court or agreed by counsel to be so; otherwise it cannot be considered by the supreme court for any purpose.—Sprinkle v. Anderson, 219.

Complaint—Commingling Causes of Action—Order to Separately State and Number—Failure to Comply—Dismissal.

10. Where plaintiff, who had been ordered to separately state and number his causes of action alleged by defendant to have been commingled in the complaint, availed himself of the time granted for that purpose and secured additional time to file, and did file, an amended complaint, which, however, did not comply with the order, the latter pleading was properly stricken from the files, and the action dismissed.—Lehfeldt Co. v. Justice, 221.

Pleading—Conclusions—Insufficiency.

11. An allegation in an action to recover the consideration paid for a written lease of real property that the lease was void was one of a legal conclusion and insufficient to support a judgment.—Moore Bros. Sheep Co. v. Lehfeldt, 227.

Complaint—Facts not Conclusions, to be Stated.

12. Under section 6532, Revised Codes, facts must be pleaded in the complaint, not conclusions, nor evidence from which facts might be inferred.—Hensen v. Merton, 231.

Same—Verification—Insufficiency.

13. The requirement that the complaint must be verified by affidavit of plaintiff that the pleading is true of his own knowledge, *etc.*, *held* not to have been met by a statement as to matters vital to his case that certain public records show certain facts of which he asserts neither knowledge nor belief.—Hensen v. Merton, 231.

Trusts—"Soldiers' Scrip"—Public Lands—Equitable Title—Complaint.

14. One who seeks to oust a patentee of public lands under soldiers' scrip secured from alleged heirs at law of a deceased Civil War soldier, must allege in his complaint such facts as will connect him with the original title from the government, and such as will bring the deceased soldier and those holding under him within the provisions of sections 2304–2307 of the Revised Statutes of the United States; otherwise it will not state a cause of action.—Hensen v. Merton, 231.

Forcible Entry—"Breaking" Open—Sufficiency of Complaint.

15. *Held*, in an action in forcible entry, that an allegation of the complaint that though the doors and windows of the dwelling in question had been securely fastened, defendant forced open the doors and windows and entered the dwelling, *etc.*, was sufficient to constitute a "breaking" open of the doors and windows, under section 7269, subdivision 1, Revised Codes.—Sprinkle v. Anderson, 223.

Personal Injuries—Contributory Negligence—How to be Pleaded.

16. Contributory negligence must be pleaded with the same degree of particularity required in charging negligence, and the party alleging it cannot prevail unless the particular acts of negligence, or one or more of them, set forth are established by his evidence.—Surman v. Cruse, 253.

Same—Negligence—Pleading—Sufficiency.

17. Whether there is a sufficient charge of negligence in a personal injury case must be determined from the facts alleged, not from the use of the descriptive terms "negligently and carelessly." Surman v. Cruse, 253.

Motion to Strike—Effect.

18. Under the civil practice, a motion to strike out a portion of a pleading is in fact and in substance a demurrer to the portion attacked.—State ex rel. Juckem v. District Court, 315.

Sustaining of Demurrer—Remedies.

19. When a demurrer to a pleading is sustained, the pleader may either take exception to the ruling, stand on his original pleading, permit judgment to go against him, and appeal therefrom, or submit to the ruling and plead over; the two courses, however, being antagonistic in principle, cannot be adopted concurrently.—State ex rel. Juckem v. District Court, 315.

Amended Pleadings—Originals *Functus Officio*.

20. Where, after a motion to strike allegations from written objections to a petition for letters of administration had been sustained, the opponent obtained an extension of time to file amended pleadings, the original ones became *functus officio*.—State ex rel. Juckem v. District Court, 315.

Same—*Mandamus*—When Writ Does not Lie.

21. *Mandamus* does not lie to compel the district court to restore matter stricken from pleadings, where the party seeking relief had asked for and secured time to file amended pleadings, thus treating the original ones as *functus officio* and leaving nothing to which restoration could be made.—State ex rel. Juckem v. District Court, 315.

District Courts Must Disregard Procedural Irregularities.

22. Under section 6593, Revised Codes, district courts must, at every stage of a case, disregard procedural irregularities and omissions which do not affect the substantial rights of the parties.—State ex rel. Jerry v. District Court, 328.

Cities and Towns—Council—Removal of Chief of Fire Department—Charges—Sufficiency.

23. In proceedings before a city council for the removal of the chief of the fire department, the charges need not be stated with the technical accuracy required in a complaint filed in court.—State ex rel. Griffiths v. Mayor of City of Butte, 368.

Same.

24. Charges that the chief of a fire department did not respond promptly to fire-alarms, did not know the location of fire hydrants, was incompetent to direct the fighting of fire, failed to tear down certain buildings as required by state fire marshal, *etc.*, *held* sufficiently definite and certain to advise the accused of the nature of the charges against him and to enable him to prepare his defense. State ex rel. Griffiths v. Mayor of City of Butte, 368.

Pleading—Specific Control General Allegations.

25. Where both general and specific allegations are made concerning the same matter, the latter control.—First National Bank of New Castle v. Grow, 376.

Promissory Notes—Negotiability—Complaint—Insufficiency.

26. *Held*, under the above rule, that the complaint in an action on a promissory note made payable to order which specifically alleged that the payee "sold, assigned and transferred" it to plaintiff, disclosed an assignment, and that the general succeeding allegation that plaintiff "is now the lawful owner and holder" thereof, was insufficient to supply the averment that the transfer was had by indorsement.—First National Bank of New Castle v. Grow, 376.

Complaint—Sufficiency—Inferences.

27. Complaint, in an action for fraud, *held* sufficient under the rule that whatever is necessarily implied in, or reasonably to be inferred from, an allegation, is to be taken as directly averred.—Kummrow v. Bank of Fergus County, 390.

Fraud—Deeds—Failure to Read Instrument—Complaint—Sufficiency.

28. Where a woman, unable to read or write the English language, who charged in her complaint that on making final proof on a desert land entry she was induced by the United States commissioner before whom proof was made, and a member of a firm (subsequently formed into a corporation), that it was necessary for her to sign, and she did sign, a water right location notice in order to acquire title to the lands, whereas the writing was a warranty deed, her failure to have the paper read and explained to her by some disinterested person did not bar her from seeking the relief demanded, and dismissal of the action was error.—Kummrow v. Bank of Fergus County, 390.

Cities and Towns—Special Improvements—Damages—Complaint—Presentation of Claim not Required.

29. Plaintiff, in an action to recover back a special improvement tax paid under protest, need not allege in the complaint that his claim had been presented to the city or town council for allowance before action was commenced, section 29 of Chapter 89, Laws of 1913, under which Act the improvements were made, not contemplating presentation thereof as a condition precedent to his right to maintain the action.—Harvey v. Town of Townsend, 407.

Admissions—What may Constitute.

30. An allegation in an answer that a fact stated in the complaint is true, or the affirmative statement therein of a fact which is likewise pleaded in the complaint, is an admission of the truth of the allegation of the complaint, and proof thereof is not necessary.—Parham v. Chicago, M. & St. P. Ry. Co., 492.

PERSONAL INJURIES.

Actionable Negligence.

1. Actionable negligence arises only from breach of legal duty.—Jonosky, Admr., v. Northern Pacific Ry. Co., 63.

Railroads—Duty Owing to Trespassers.

2. The only duty owing by a railway company to a trespasser upon its tracks is to refrain from wantonly or willfully injuring him after discovering his presence in a position of peril.—Jonosky, Admr., v. Northern Pacific Ry. Co., 63.

Same—Implied Invitation—Implied License—Definition.

3. An invitation is inferred where there is a common interest or mutual advantage; a license is implied where the object is the mere

pleasure, convenience or benefit of the person enjoying the privilege. Jonosky, Admr., v. Northern Pacific Ry. Co., 63.

Same—Duty Owing to Licensee.

4. Under the above rule (par. 3), decedent, who was fatally injured while attempting to crawl under the coupling between two cars of a freight train standing in defendant company's yards, rather than take a more circuitous route and cross at a street crossing, was a bare licensee, to whom defendant owed no duty other than that of not knowingly and willfully causing him harm.—Jonosky, Admr., v. Northern Pacific Ry. Co., 63.

Same—Common-law Rule.

5. Under the common law adopted in this state, in the absence of legislative declaration to the contrary, the owner of premises owes to a licensee no duty as to their condition, save that of not knowingly exposing him to hidden perils or wantonly and willfully causing him harm; the licensee enjoying the license subject to the concomitant perils arising from the owner's use in the ordinary course of business.—Jonosky, Admr., v. Northern Pacific Ry. Co., 63.

Master and Servant—Railroads—Excessive Verdict.

6. *Held*, that a verdict for $17,500 for the partial loss of plaintiff's left eye, the sight of the right having been destroyed many years before, was excessive, it appearing that he was sixty-seven years of age, with a life expectancy of ten years, was at the time of the accident, and had been for the five years preceding, earning $50 a month operating a stationary gasoline engine at a water-tank.—Cornell v. Great Northern Ry. Co., 177.

Same—Mortality Table—Evidence.

7. Mortality tables are competent evidence to aid the jury in determining the probable duration of the life of an injured employee, and may be used to aid them, by comparing his earnings before and after the injury, to ascertain the amount which will compensate him for his loss by reason of impairment of his earning capacity.—Cornell v. Great Northern Ry. Co., 177.

Same—Damages—Mortality and Annuity Tables.

8. In determining the amount to be awarded plaintiff in a personal injury action, the jury must be left to exercise their discretion, unlimited by any fixed standard, after examining the facts and circumstances of the case, considering annuity and mortality tables, *etc.* Cornell v. Great Northern Ry. Co., 177.

Same—Mortality Tables—Evidence—Purpose of Introduction.

9. The office of mortality tables in a personal injury case is to furnish the jury a basis by which they may ascertain the present worth of the several sums which, but for the injury, would have been received by plaintiff in the form of deferred payments, and the earning power of money in the general community in which the injury occurred; they can only serve as a guide in determining the amount of the verdict and not as an absolute standard by which to fix the award.—Cornell v. Great Northern Ry. Co., 177.

Same—Instructions—Mortality and Annuity Tables—Not to be Viewed as Definite Standard for Awarding Damages.

10. *Held*, that an instruction from which the jury could infer that they were at liberty to regard mortality and annuity tables as furnishing an authorized and definite standard by which they might fix their award in a personal injury action, was prejudicially erroneous. Cornell v. Great Northern Ry. Co., 177.

Same—Loss of Sight—Cost of Attendant—Evidence—When Incompetent.

11. Evidence that it would cost $100 a month to provide an attendant for a blind man, *held* incompetent where the question whether plaintiff, where sight, though impaired, was not destroyed, would ever need an attendant was left to speculation as to what might or might not occur in the future.—Cornell v. Great Northern Ry. Co., 177.

Same—Total Blindness—Care and Attendance—Damages.

12. *Obiter:* In a case in which the plaintiff has become totally blind by reason of the injury complained of, or where there is evidence tending to show a reasonable probability that the injury will finally produce that result, the jury may, in assessing the damages, take into consideration the fact that he will need care and attention by others, if there is evidence showing with reasonable certainty that such need will arise and when it will arise.—Cornell v. Great Northern Ry. Co., 177.

Same—Employers' Liability Act—Purpose of Legislation.

13. The purpose of the legislature in enacting the Employers' Liability Act (Chap. 29, Laws 1911) was to substitute for the benefit of railway employees the action provided by it, in place of the common-law action, and, in case of death, to create a new cause of action in favor of the dependents named, for the pecuniary loss suffered by them.—Cornell v. Great Northern Ry. Co., 177.

Same—Employers' Liability Act—Pleadings.

14. The Employers' Liability Act (Chap. 29, Laws 1911), does not change in any particular the form of the statement of plaintiff's cause of action from that at common law, but does require all the other pleadings to be so formulated as to present the issues arising upon defenses permitted by it, including the matter which may be alleged in mitigation of damages.—Cornell v. Great Northern Ry. Co., 177.

Same—Contributory Negligence—Burden of Proof.

15. *Held*, that the rule that in a personal injury action the burden of pleading and proving contributory negligence on the part of the plaintiff is upon defendant was not changed by the Employers' Liability Act, *supra*, and that refusal of an offered instruction placing the burden upon plaintiff was proper.—Cornell v. Great Northern Ry. Co., 177.

Same—Contributory Negligence—Partial Defense—Must be Pleaded.

16. Under the rule of comparative negligence declared by Chapter 29, Laws of 1911, contributory negligence on the part of plaintiff is a partial defense which must be pleaded.—Cornell v. Great Northern Ry. Co., 177.

Same—Physical Examination—Instructions—Proper Refusal.

17. An instruction that plaintiff's refusal to submit to a physical examination in the presence of the jury might be considered by them and given such weight as they might in their discretion deem proper, *held* properly refused, the defendant, under *May* v. *Northern Pac. Ry. Co.*, 32 Mont. 522, not having any right to demand such an examination.—Cornell v. Great Northern Ry. Co., 177.

Same—Assumption of Risk—When Defense not Available.

18. *Held*, that the defense of assumption of risk was not available to defendant, in an action under Chapter 29, Laws of 1911, where such risk arose by reason of the negligence of one of defendant company's employees in failing to make proper repairs on a gasoline engine when called to his attention.—Cornell v. Great Northern Ry. Co., 177.

Same—Assumption of Risk—Jury Question.

19. The question whether the plaintiff assumed the risk incident to remaining in defendant's employment for a period of two months and a half after repairs on a gasoline engine became necessary, but were not made, was a question to be determined by the jury.—Cornell v. Great Northern Ry. Co., 177.

Same—Master and Servant—Faulty Method in Conducting Work—When Negligence.

20. An employer has the right to conduct his business in his own way, provided the method he selects is reasonably safe; if so far faulty that it can be said to be negligence to pursue it, and injury results proximately therefrom to the employee, the employer is liable.—Surman v. Cruse, 253.

Same—Mines—Faulty Method—How Determinable.

21. Defendant was not required to select the best method or the safest appliances for holding a large rock in place in mine workings, and the question whether the method adopted was proper was determinable by actual conditions, not by comparison with other methods which might have been used.—Surman v. Cruse, 253.

Same—Safe Place Rule—When Inapplicable.

22. The safe place rule *held* not to apply in the case of a timberman employed in a mine to make safe dangerous places in the workings, whether pointed out to him by another or discovered by himself, though it is incumbent upon the master to minimize the danger so far as practicable.—Surman v. Cruse, 253.

Same—Negligence—Custom Does not Exonerate.

23. Custom never exonerates from the imputation of negligence. Surman v. Cruse, 253.

Same—Custom—Instruction.

24. An instruction that if defendant had employed a method customarily employed by miners in making a dangerous place safe by spragging, no liability attached, provided it was a reasonably safe way in which the danger could be prevented was not objectionable as contrary to the rule that custom does not exonerate from the imputation of negligence.—Surman v. Cruse, 253.

Contributory Negligence—Must be Pleaded.

25. Contributory negligence must be pleaded with the same degree of particularity required in charging negligence, and the party alleging it cannot prevail unless the particular acts of negligence, or one or more of them, set forth are established by his evidence.—Surman v. Cruse, 253.

Same—Negligence—Pleading.

26. Whether there is a sufficient charge of negligence in a personal injury case must be determined from the facts alleged, not from the use of the descriptive terms "negligently and carelessly."—Surman v. Cruse, 253.

PHYSICIANS AND SURGEONS.

Physical examination of plaintiff in action for personal injuries,—see Personal Injuries, 17.

Treatment of Patient—Degree of Skill to be Exercised—Rule.

1. When one holds himself out as a physician or surgeon, whether licensed or not, and accepts employment as such to treat a patient, he assumes toward the latter the obligation to exercise such reasonable care and skill in that behalf as is usually exercised by physicians or surgeons of recognized schools who practice in the com-

munity in which he resides, having due regard to the condition of medical or surgical science at that time.—Hansen v. Pock, 51.

Unjustifiable Treatment of Patient—Liability of Chinese Doctor.

2. *Held*, under the above rule, that a Chinese herb doctor who held himself out as able to cure any kind of chronic disease was liable in damages to the widow of a patient who died after treatment for disease of the kidneys by defendant, when in fact he was, and had been for some twenty years, suffering from pulmonary tuberculosis, which treatment could not be justified by the rules of recognized schools of medicine.—Hansen v. Pock, 51.

POLICE OFFICERS.

See, also, Criminal Law, 16–21.

Carrying revolver in courtroom while on trial for assault,—see Criminal Law, 19.

Police Officer Making Arrest—Criminal Liability for Assault.

1. While, under Revised Codes, section 9064, in making a lawful arrest, the officer may use all necessary means to effect the arrest if the person to be arrested either flees or forcibly resists, if he unnecessarily assaults him he is criminally liable for such assault.—State v. Prlja, 461.

POWERS.

Of county commissioners—When nondelegable,—see County Commissioners, 2, 3.

PRESUMPTIONS.

Legislation.

1. The legislature is presumed to have understood the meaning of the words used in legislation, and that the words used were used in the common and ordinary meaning.—Helena L. & Ry. Co. v. Northern Pac. Ry. Co., 93.

Nonsuit.

2. On motion for nonsuit, every fact is deemed to be proved which the evidence tends to establish, and if, viewed in the light most favorable to plaintiff, it makes out a *prima facie* case, it is error to grant the motion.—Sprinkle v. Anderson, 223.

Railroads—Killing Livestock—Negligence—Conflict in Evidence—Jury Question.

3. Positive testimony by defendant's employees that the train which killed plaintiffs' livestock near an unfenced siding was properly equipped with safety devices and that all reasonable care was exercised to prevent the accident merely created a conflict in the evidence determinable by the jury, and did not overcome the presumption of negligence raised by the fact of the killing.—Knop v. Chicago, Milwaukee & St. Paul Ry. Co., 288.

Criminal Law—Intent—Disputable Presumptions.

4. The presumption that an unlawful act was committed with an unlawful intent is disputable.—State v. Smith, 563.

PRINCIPAL AND AGENT.

Carriers—Livestock—Authority of Attendant—Jury Question.

1. *Held*, that the question whether the person in charge of a livestock shipment, or "shipper," so styled by plaintiff, had ostensible authority to direct the conductor in charge of the train not to stop

for feeding at a certain station, contrary to an established custom, or was acting as a mere special agent with no other authority than to act as attendant, was one for determination by the jury.—Parham v. Chicago, M. & St. P. Ry. Co., 492.

PROBATE PROCEEDINGS.

See, also, Estates of Deceased Persons.

Settling account of executor—Record on appeal,—see Appeal and Error, 10, 11.

PROHIBITION.

Scope of Writ.

1. The office of the writ of prohibition is primarily to arrest proceedings, but when a case arises in which there are orders to be annulled and proceedings to be stayed, it will, upon a proper showing, annul all prior orders and stay such further proceedings as may be necessary to make the remedy complete.—State ex rel. Thompson v. District Court, 433.

When Appeal No Bar to Writ.

2. Where the remedy by appeal from an order allowing alimony *pendente lite*, attorney's fees and suit money is not adequate or speedy, the fact that an appeal lies is not sufficient reason for denying the writ of prohibition against the enforcement of the order.—State ex rel. Wooten v. District Court, 517.

Extent of Review by Supreme Court.

3. In determining whether the district court exceeded its jurisdiction in making an order of the nature of the above in an action for annulment of marriage asked for on the ground that defendant wife was physically incapable, the supreme court may examine not only the pleadings but the evidence before the trial court.—State ex rel. Wooten v. District Court, 517.

PROHIBITION ACT.

See Intoxicating Liquors.

PROMISSORY NOTES.

See Bills and Notes.

PUBLIC LANDS.

Indian allotments,—see Indians.

Soldiers' scrip,—see Trusts, 4, 5.

PUBLIC POLICY.

Definition.

1. "Public policy" is that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or is against public good, and is declared by the Constitution and statutes and, in the absence of declarations by either, by the decisions of the courts.—Spaulding v. Maillett, 318.

PUBLIC UTILITY ACT.

See Contracts, 13.

QUANTUM MERUIT.

Work and Labor—Proof of Express Contract—Variance.

1. One suing on *quantum meruit* for the value of services rendered may testify to an express promise to pay a specified amount; the only effect in such a case of proof of an express contract fixing the price, being that the stipulated price becomes the *quantum meruit* in the case; hence the testimony is not objectionable on the ground of variance.—Daly v. Kelley, 306.

Same—Value of Services—Testimony of Unqualified Nonexpert Witness—Immateriality.

2. Where plaintiff in an action on *quantum meruit*, after testifying to an express agreement fixing his compensation, stated that the sum agreed upon was the reasonable value for the services rendered, the fact that he did so without first technically qualifying as an expert witness was inconsequential.—Daly v. Kelley, 306.

QUIETING TITLE.

See Mines and Mining, 4.

RAILROADS.

See, also, Eminent Domain; Personal Injuries, 1–19.

Fencing—Side-tracks and Spurs—Liability for Injuring Livestock.

1. *Held*, under section 4308, Revised Codes, that a railroad company is not required to fence its tracks at spurs or sidings, and is liable for injuries to livestock at such places only where its actual negligence is established.—Knop v. Chicago, Milwaukee & St. Paul Ry. Co., 288.

Same—Livestock—Injury or Killing—*Prima Facie* Case of Negligence.

2. Proof of the injury or killing of livestock on the unfenced portion of a railroad track near a siding or spur establishes a *prima facie* case of negligence on the part of the company, notwithstanding the provisions of section 4308 as above construed.—Knop v. Chicago, Milwaukee & St. Paul Ry. Co., 288.

Same—Presumption of Negligence—Conflict in Evidence—Jury Question.

3. Positive testimony by defendant's employees that the train which killed plaintiff's livestock near an unfenced siding was properly equipped with safety devices and that all reasonable care was exercised to prevent the accident merely created a conflict in the evidence determinable by the jury, and did not overcome the presumption of negligence raised by the fact of the killing.—Knop v. Chicago, Milwaukee & St. Paul Ry. Co., 288.

Livestock—Contract of Carriage—Ambiguity—Parol Evidence.

4. Where a contract of carriage of livestock provided that transportation should be had to a named station in another state, and from thence via a given carrier and connections "to ——" station, consigned to D., an ambiguity as to destination existed which could be explained by parol testimony.—Parham v. Chicago, M. & St. P. Ry. Co., 492.

Same—Liability for Negligence of Connecting Carrier.

5. In an action for damages flowing from the failure of the carrier of livestock to stop over at a certain station for the purpose of feeding, according to established custom, the carrier could not escape liability by proof that the cause of action arose after the shipment was taken over by a connecting carrier, where the shipper was charged through rates from the point of shipment in Montana to

destination in another state, its liability in this respect being unaffected by the fact that the person in charge of the stock signed a new contract with the connecting carrier.—Parham v. Chicago, M. & St. P. Ry. Co., 492.

Same—Failure to Stop and Feed—Custom—Evidence.

6. Where a contract for the shipment of livestock was made with reference to a custom not mentioned therein, to stop over at a certain point for feeding, proof of the custom was admissible for the purpose of ascertaining the intent or understanding of the parties, and was not objectionable as tending to vary by parol the terms of the writing.—Parham v. Chicago, M. & St. P. Ry. Co., 492.

Same—Authority of Attendant—Jury Question.

7. *Held*, that the question whether the person in charge of a livestock shipment, or "shipper," so styled by plaintiff, had ostensible authority to direct the conductor in charge of the train not to stop for feeding at a certain station, contrary to an established custom, or was acting as a mere special agent with no other authority than to act as attendant, was one for determination by the jury.—Parham v. Chicago, M. & St. P. Ry. Co., 492.

Same—Notice of Claim of Loss—Secondary Evidence—Harmless Error.

8. Where there was valid proof of service of notice of claim for loss on the connecting carrier within the time fixed by the contract of carriage, error in admitting secondary evidence thereof, without demand on defendant to produce the original, was not prejudicial.—Parham v. Chicago, M. & St. P. Ry. Co., 492.

Same—Purpose of Notice of Claim of Loss—Measure of Damages.

9. The notice of claim of loss sustained in transportation by a shipper of livestock is to enable the carrier to make investigation as to the situation and conditions existing at the time and in order that there may be no unreasonable delay in bringing action, and does not bar recovery of a larger amount than that stated in it, except perhaps, where the sum claimed has been tendered in settlement.—Parham v. Chicago, M. & St. P. Ry. Co., 492.

REAL PROPERTY.

See, also, Brokers; Contracts; Deeds; Eminent Domain; Fraud.

Deeds—Escrow—Immediate Possession—Nature of Title of Buyer.

1. Where the buyer of land was permitted to take immediate possession under a contract which provided for payment of the purchase price in annual installments, deed to be deposited in escrow and delivered upon full compliance with the terms of sale, his title was no more than an equitable one, default on his part in any one of its conditions giving the seller the privilege to declare his rights lost and consider him a mere tenant at will.—Wright Land & Investment Co. v. Even, 1.

Contract of Sale—Breach—Liquidated Damages—Rent.

2. Where a contract of sale of land contains a provision that a fixed amount may be regarded as liquidated damages or as rent in case of default in any deferred payment of the purchase price, the instrument is executory in character, and not a sale.—Wright Land & Investment Co. v. Even, 1.

REBATING.

A misdemeanor,—see Insurance, 2.

RECORDATION.

Or deeds a property right,—see Deeds, 4.

RECORD ON APPEAL.

Probate proceedings,—see Appeal and Error, 10, 11.

On appeal—Where evidence not made part of bill of exceptions—How made part of record,—see Appeal and Error, 7.

REFEREES.

Findings—When Conclusive.

1. Where the evidence in a proceeding looking to the revocation of an attorney's license because of lack of moral qualifications, was conflicting, the referee's findings will be adopted.—In re Sullivan, 592.

REFERENDUM.

See Constitution, 2–6, 10–14.

REHEARINGS.

What not reviewable,—see Appeal and Error, 15.

REMEDIES.

Sustaining demurrer,—see Pleading and Practice, 19.

Fraud.

1. A party who has been fraudulently induced to enter into a contract may either rescind, or elect to carry it out and recover damages suffered by reason of the fraud, unless he waives such right.—Koch v. Rhodes, 447.

RES ADJUDICATA.

See Appeal and Error, 13.

RESCISSION.

Sales—Fraud,—see Remedies, 1.

SALARIES.

Of officers—Increase—Constitutional limitations,—see Officers, 1–3.

SALES.

See, also, Brokers; Contracts; Real Property; Goodwill; Statute of Frauds.

Delivery to Other Than Buyer.

1. Delivery of goods to one designated by the buyer is delivery to the buyer himself.—Fergus County Hardware Co. v. Crowley, 840.

SEARCHES AND SEIZURES.

See Intoxicating Liquors.

SEARCH-WARRANTS.

See, also, Intoxicating Liquors, 8, 10.

Strict Construction.

1. The authority of an officer conferred by a search-warrant is not to be extended by construction to any case not clearly covered by the statute.—State v. Malarky, 132.

SEDITION.

See Criminal Law, 5–15, 25–34, 37–59.

SHERIFFS.

Attachment—Caretaker—Unauthorized Appointment—Compensation—Personal Liability.

1. A sheriff who fails to secure an order authorizing the appointment of a keeper before appointing him may be held personally liable for his compensation, the keeper being under no obligation to first ascertain whether such an order has been secured.—Daly v. Kelley, 306.

Same—Caretaker—Appointment by Deputy—Liability for Compensation.

2. The fact that the appointment of the keeper of attached property referred to in paragraph 1, *supra*, was made by defendant sheriff's deputy did not relieve defendant of liability for the keeper's compensation, in view of section 350, Revised Codes, defining the powers of deputies, and the maxim "*qui facit per alium facit per se.*"—Daly v. Kelley, 306.

Same—Deputies—Appointment of Caretaker—Proper Cross-examination.

3. Since defendant sheriff's deputy had the authority to appoint a caretaker for attached property as an incident to his duty to attach and safely keep it, a question on cross-examination whether this was the first caretaker he had ever appointed was not improper.—Daly v. Kelley, 306.

Same—Caretaker—Compensation.

4. The fact that plaintiff, while acting as keeper of attached mining property, was at the same or part of the time acting in a different capacity for the receiver, did not preclude him from recovering the reasonable value of his services as keeper under appointment by defendant.—Daly v. Kelley, 306.

Same—What not Excessive Verdict.

5. A verdict of $800 for services as keeper of attached mining property for a period of 400 days, part of which time plaintiff was employed by the receiver as superintendent, *held* not excessive. Daly v. Kelley, 306.

SLANDER.

See Libel and Slander.

SOLDIERS' SCRIP.

See Trusts, 4, 5.

SPECIAL DEPUTIES.

Assessors—Compensation,—see Counties, 1.

SPECIAL IMPROVEMENT DISTRICTS.

See Cities and Towns, 6–16.

SPECIAL INTERROGATORIES.

Trial—Discretion.

1. Whether special interrogatories shall be submitted in any given case is a question addressed to the sound judicial discretion of the trial court, in the absence of a showing of abuse of which the supreme court will not interfere.—Duckett v. Biggs, 443.

SPECIFIC PERFORMANCE.

Purpose of Action.

1. The purpose of an action for specific performance is to have defendant execute a conveyance of the title which he refuses to convey.—Jacobson v. Roman, 299.

STATE EFFICIENCY AND TRADE COMMISSION.

Compensation of assistants,—see Mandamus, 3.

STATUTE OF FRAUDS.

Promise to Answer for Another's Debt—When Question of Law—When of Fact.

1. If the language employed in making a promise to pay the debt of another is such that by immemorial usage and common custom it has but one meaning, the character of the promise is to be determined as a question of law; where, however, it is such that reasonable minds might differ as to the meaning intended to be conveyed, its character is to be determined as a question of fact.—Breidenbach v. Upper Valley Orchards Co., 247.

Same—When Promise Collateral.

2. Where goods were ordered by and delivered to an independent contractor performing work for defendant company, and charged to him on plaintiff's books, and plaintiff in a former action to recover their price brought suit against the contractor alone, looking to him primarily and the company only as guarantor, the promise of the manager of the company to see that plaintiff "got his money" was a collateral one which, not being in writing, was void under the statute of frauds.—Breidenbach v. Upper Valley Orchards Co., 247.

Same—Extension of Credit to Buyer—Effect.

3. Where credit for goods was extended to the person who ordered them and to whom they were delivered, and not exclusively to him who was sought to be held liable for their price under an oral promise to see that the seller "got his money," the promise was void under the statute of frauds, even though the promise was the principal inducement for the sale.—Breidenbach v. Upper Valley Orchards Co., 247.

Sales—Promise to Answer for Another's Debt—When Original Obligation.

4. Where defendant had instructed a merchant who had refused to extend credit to a third person to send the goods desired to such person with the assurance that he (defendant) would pay for them, and credit was extended solely to defendant, the obligation to pay for them was original and not affected by the statute of frauds.—Fergus County Hardware Co. v. Crowley, 340.

Same—Extension of Credit to Promisor—Billing of Goods to and Partial Payment by Another—Effect.

5. The facts that the goods referred to above were charged to the person to whom they were sent and not to the defendant, that bills for them were rendered to the former and partial payments received from him, *held* not to have been conclusive against plaintiff, but subject to explanation on the question to whom credit was extended. Fergus County Hardware Co. v. Crowley, 340.

Same—Delivery to Other Than Buyer—Variance.

6. Delivery of goods to one designated by the buyer is delivery to the buyer himself; hence there is no variance between an allegation of delivery of goods to the buyer and proof of delivery to one designated by him.—Fergus County Hardware Co. v. Crowley, 340.

STATUTE OF LIMITATIONS.

Probate Proceedings—Statute of Limitations.

1. On the expiration of one year within which a will after probate may be contested, as provided by section 7407, Revised Codes, which is in effect a statute of limitations, the running of which commences with the date of the admission of the will to probate, the probate becomes final and is not open to either direct or collateral attack.—In re Estate of Murphy, 273.

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STATUTES AND STATUTORY CONSTRUCTION.

Presumptions.

1. The legislature is presumed to have understood the meaning of the words used in legislation, and that the words used were used in the common and ordinary meaning.—Helena L. & Ry. Co. v. Northern Pac. Ry. Co., 93.

Statutes—Impairment of Obligation—Constitution.

2. An Act which, in any degree, modifies the obligation of a contract, by attempting to relieve one party from a duty assumed under it, is repugnant to the constitutional prohibition against the impairment of the obligation of contracts.—Helena L. & Ry. Co. v. Northern Pac. Ry. Co., 93.

Statutory Construction—Adoption of Statute from Another State—Rule.

3. Unless the decision of the highest court of another state construing a statute appeals to the supreme court as founded upon right reasoning, it will not be followed simply because the statute was borrowed from that state after such construction.—State ex rel. Goodman v. Stewart, 144.

Same—Legislative Intent.

4. In construing an Act, the intention of the law-making body should be ascertained and given effect.—State ex rel. Goodman v. Stewart, 144.

Statutes—Validity—Questions of Expediency, Necessity, *etc.*, of No Concern to Courts.

5. In passing upon the validity of a statute, courts are not concerned with the expediency, utility, justice of, or the necessity for, the legislation, nor with the question whether certain amendments

enacted improve the original Act.—State ex rel. Goodman v. Stewart, 144.

Same—Construction—Rules Applicable.

6. The rules applicable to the construction of statutes are also applicable to the construction of provisions of the Constitution.—State ex rel. Gleason v. Stewart, 397.

Same.

7. In construing a provision of the Constitution (or statute), courts must first ascertain its purpose and intent, taking in its obvious sense the language used, aided by the ordinary rules of grammar; recourse to other rules of construction not being permissible until failure of this method of construction.—State ex rel. Gleason v. Stewart, 397.

Referendum—County Clerk—Certifying List of Legal Voters—Invalid Provision.

8. *Held*, that the provision of section 108, Revised Codes, requiring county clerks to compare the signatures on a petition for referendum with their signatures on the registration books and blanks for the preceding general election and certify them to the secretary of state as legal voters, is invalid as excluding all persons who had become legal voters in the interim between the last general election and the time of signing such petition.—State ex rel. Gleason v. Stewart, 397.

Cities and Towns—Special Improvements—Date of Hearing Objections—Statutory Provision Directory.

9. The provision of section 5, Chapter 89, Laws of 1913, that objections to a proposed special improvement shall be heard at the next regular meeting of the city council after the expiration of the fifteen days in which protest can be made, *etc.*, is directory only.—Harvey v. Town of Townsend, 407.

New Counties—Constitutionality of Act.

10. Chapter 226, Laws of 1919, held not violative of section 11, Article XII, of the Constitution, as casting unequal burdens of taxation upon county from which new county is taken.—State ex rel Woodward v. Moulton, 414.

Statutes—Irregularity in Legislative Proceedings—Extent of Review of Journals.

11. Under the rule that where the constitutionality of an Act is questioned on the ground of irregularity in its passage, the only purpose for which courts may go behind the enrolled bill is to ascertain whether the aye and no vote was entered in the journals of the legislative assembly, it is not permissible to determine whether an amendment to a bill made by a joint conference committee was considered by either house before passage upon third reading.—State ex rel. Woodward v. Moulton, 414.

Statutory Construction—Intent of Legislature.

12. Statutes should be given an interpretation best calculated to carry out the intent of the legislature in enacting them.—Reeve v. City of Billings, 552.

Statutes—Legislative Intent Controlling.

13. The legislative intention in the enactment of a statute, if ascertainable, is controlling.—State v. Smith, 563.

STENOGRAPHERS.

Reading from transcript of notes,—see Evidence, 45.

STOCK AND STOCKHOLDERS.

See Corporations.

SUMMONS.

Indorsement of Name of Plaintiff's Attorney—Purpose of Requirement.

1. The purpose of the requirement of section 6515, Revised Codes, that the name of plaintiff's attorney must be indorsed on the summons, is to advise defendant who plaintiff's attorney is, so that he may know to whom notice must be given of any step he may desire to take in his defense.—State ex rel. Jerry v. District Court, 328.

Failure of Indorsement of Attorney's Name—Insufficient Ground for Vacation of Default Judgment.

2. *Held*, on application for writ of supervisory control to annul an order vacating a default judgment made because the name of plaintiff's attorney had not been indorsed on the summons, that defendant having been served with a copy of the complaint upon which appeared the name of such attorney and, in pursuance of the knowledge thus gained, discussed a compromise of the case with him, the substantial rights of defendant were not injuriously affected by the omission, and that vacation of the judgment was error.—State ex rel. Jerry v. District Court, 328.

When Fatally Defective.

3. An omission by the clerk to embody in the summons the contents prescribed by section 6515, Revised Codes, or to subscribe his name, or to affix his seal renders it fatally defective.—State ex rel. Jerry v. District Court, 330.

SUPERVISORY CONTROL.

See, also, Summons, 2.

Writ Lies, When.

1. The fact that an appeal is available to relator on application for writ of supervisory control is not conclusive of his right to the relief prayed for, if the case presented is exigent and the remedy by appeal is inadequate.—State ex rel. Jerry v. District Court, 328.

SUPREME COURT.

Jurisdiction.

1. The supreme court has appellate jurisdiction only, except as to those matters over which original jurisdiction is expressly conferred, and will therefore not consider any question on appeal in a civil case not raised in the trial court.—In re Estate of Murphy, 273.

Appeal—Rehearing—What will not be Considered.

2. On petition for rehearing, the supreme court will not consider grounds not presented on the original hearing. (On Motion for Rehearing.)—In re Estate of Murphy, 273.

TAXATION.

"Taxpayer"—Definition.

1. A "taxpayer" within the meaning of section 2 of the New Counties Act (Chap. 226, Laws of 1919) which requires petitions for the creation of a new county to be verified by five resident taxpayers, is one who owns property within the county and who pays, or is subject to and liable for, a tax.—State ex rel. Woodward v. Moulton, 414.

TECHNICALITIES.

Disregarded on appeals in criminal actions,—see Appeal and Error, 21.

District Courts—Procedural Irregularities—Harmless Error.

1. Under section 6593, Revised Codes, district courts must, at every stage of a case, disregard procedural irregularities and omissions

which do not affect the substantial rights of the parties.—State ex rel. Jerry v. District Court, 328.

TITLE.

Evidence of title—Recordation of deed—Property right,—see Deeds, 4.

Nature of, acquired by buyer of land under escrow agreement,—see Real Property, 1.

TRESPASS.

Duty owing by railroads to trespassers,—see Personal Injuries, 2–5.

TRIAL.

By jury,—see Jury.

Prima facie case,—see Evidence, 4.

Reopening case,—see Pleading and Practice, 1.

See, also, Amendments; Bill of Exceptions; Burden of Proof; Criminal Law; Cross-examination; Evidence; Findings; Instructions; Judgments; Jury; New Trial; Pleading and Practice; Special Interrogatories; Technicalities; Verdicts; Witnesses.

TRUSTS.

Findings—Evidence—Sufficiency.

1. Evidence examined, in an action to have defendant decreed a trustee, for the use and benefit of plaintiff, of one-half of mining property, deed to which had been taken in the name of the brother of defendant, with intent to cheat and defraud plaintiff, and by him transferred to defendant, and *held* sufficient to support the findings of the court in favor of defendant.—Bosanatz v. Ostronich, 197.

Relationship Nonexistent, When.

2. Where defendant promised to lend financial aid to plaintiff should the latter find a mine property on which he could secure a lease, and pursuant to such agreement plaintiff disclosed to defendant such knowledge as he had concerning two claims, but neither claim was leased, defendant was under no liability to account as trustee to plaintiff for a half interest in other claims thereafter purchased by defendant.—Bosanatz v. Ostronich, 197.

Public Lands—Burden of Proof.

3. In an action to have the patentee of public lands declared trustee for plaintiff, and to require the execution and delivery of a deed to the property to him, he had the burden of showing such equities in himself as would control the legal title in the hands of defendant.—Hensen v. Merton, 231.

Same—"Soldiers' Scrip"—Public Lands—Equitable Title—Complaint.

4. One who seeks to oust a patentee of public lands under soldiers' scrip secured from alleged heirs at law of a deceased Civil War soldier, must allege in his complaint such facts as will connect him with the original title from the government, and such as will bring the deceased soldier and those holding under him within the provisions of sections 2304–2307 of the Revised Statutes of the United States; otherwise it will not state a cause of action.—Hensen v. Merton, 231.

Same—"Soldiers' Scrip"—Right of Soldier Extended to Minor, not Adult, Children.

5. Only minor children of a Civil War soldier, acting by a duly appointed and accredited guardian, were, in case of death of the

father, entitled to enter public land under sections 2304–2307 of the Revised Statutes of the United States, the right being extended by section 2307 to them only, not to adults.—Hensen v. Merton, 231.

VARIANCE.

See, also, Pleading and Practice, 5, 6; Quantum Meruit, 1.

Sales—Delivery to Other Than Buyer.

1. Delivery of goods to one designated by the buyer is delivery to the buyer himself, hence there is no variance between an allegation of delivery of goods to the buyer and proof of delivery to one designated by him.—Fergus County Hardware Co. v. Crowley, 340.

VENDOR AND PURCHASER.

See Real Property; Sales.

VERDICTS.

Directed, when proper,—see Malicious Prosecution, 1.

Personal Injuries—Master and Servant—Railroads—Excessive Verdict.

1. *Held*, that a verdict for $17,500 for the partial loss of plaintiff's left eye, the sight of the right having been destroyed many years before, was excessive, it appearing that he was sixty-seven years of age, with a life expectancy of ten years, was at the time of the accident, and had been for the five years preceding, earning $50 a month operating a stationary gasoline engine at a water-tank. Cornell v. Great Northern Ry. Co., 177.

Work and Labor—What not Excessive Verdict.

2. A verdict of $800 for services as keeper of attached mining property for a period of 400 days, part of which time plaintiff was employed by the receiver as superintendent, *held* not excessive.—Daly v. Kelley, 306.

Directed Verdict—When not Warranted.

3. The fact that testimony is uncontradicted is not alone sufficient to warrant a directed verdict, where the inferences to be drawn from all the circumstances are open to different conclusions by reasonable men.—First Nat. Bank of Lewistown v. Wilson, 384.

Fraud—What not Excessive Verdict.

4. A verdict for $2,500 damages for fraudulent representations on a sale of land, the contract price for which was $9,500, *held* not excessive, where eighty acres of supposedly pasture land was covered with slide rock, in addition to a deficiency of forty acres in the acreage, and a difference of 150 tons in the amount of hay per annum between what defendant claimed could be cut and that actually cut.—Koch v. Rhodes, 447.

VERIFICATION.

Of complaint—Insufficiency,—see Pleading and Practice, 13.

WAIVER.

By defendant, charged with crime, of constitutional privilege by going upon witness-stand in his own behalf,—see Evidence, 20.

Cities and Towns—Special Improvements—Damages.

1. By failure of an objecting property owner to give notice of defects or irregularities in the proceedings to the council within sixty days after the contract for the work is let, he waives all claim for

damages, under section 13 of Chapter 89, Laws of 1913.—Harvey v. Town of Townsend, 407.

Fraud—Right of Action—Intent.

2. By the affirmance of a contract one may waive his right to rescind as well as his right of action for damages on account of fraud practiced upon him to induce him to enter into it, but it is only when the intention to waive is clearly manifested that a waiver will be declared.—Koch v. Rhodes, 447.

What Does not Constitute Waiver.

3. *Held*, that plaintiff's action in making a partial payment on the purchase price of the land under an alleged fraudulent contract, after commencement of suit for damages, did not amount to a waiver of his right to recover, where he notified defendant seller that the payment, then due, was made without waiver.—Koch v. Rhodes, 447.

Criminal Law—Information—Demurrer—Motion in Arrest.

4. The objection that the information does not state facts constituting a public offense is not waived by failure to demur, but may be raised by motion in arrest of judgment.—State v. Wehr, 469.

WILLS.

See Estates of Deceased Persons, 8–10.

WITNESSES.

See, also, Evidence.

Eye-witness to homicide,—State need not call, when,—see Evidence, 42.

Competency of attorney to testify in his action against an estate,—see Evidence, 3.

Credibility—Question for Trial Court.

1. A court is not bound to accept a fact as proved merely because a witness has sworn to it; creditable swearing only concluding its judgment.—Gervais v. Rolfe, 209; State v. Nielsen, 142.

Mileage and *Per Diem*—Proper Allowance.

2. In the absence of a clear showing of bad faith on the part of the prevailing party in calling a witness, the trial court's action in allowing him mileage and *per diem* will not be interfered with on appeal, the fact that the testimony was immaterial to any issue made by the pleadings not changing the rule.—Spaulding v. Maillet, 318.

WORDS AND PHRASES.

"Agreement to sell and buy"—(Rev. Codes, sec. 5084).
Wright Land & Investment Co. v. Even, 10.

"Annuity tables"—
Cornell v. Great Northern Ry. Co., 190.

"Benefit"—(Rev. Codes, sec. 7341, subd. 3).
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"Block"—(Chap. 226, sec. 2, Laws 1919).
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"Calculate"—(Chap. 11, Laws Ex. Sess. 1918).
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"Certificate of location"—
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"Deliver" intoxicating liquors—
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"Direct"—
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"Direct payment of money"—
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"Dispose of"—(Chap. 143, sec. 14, Laws 1917).
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"Existing contracts"—(Laws 1913, Chap. 52, sec. 12).
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"Impartial jury"—(Art. III, sec. 16, Const.).
State v. Brooks, 487.

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